91-1835

No..

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DOUGLAS M. BIHLER, THOMAS D. KUEHL, PAULA C. MILLER and LISA P. TALLAR-KUEHL,

Petitioners,

v.

ALAN D. EISENBERG, Individually and as Trustee and Administrator of the Alan D. Eisenberg, S.C. Pension and Profit Sharing Plan, and as President and Sole Director of Alan D. Eisenberg, S.C.; THE ALAN D. EISENBERG, S.C. PENSION AND PROFIT SHARING PLAN; and ALAN D. EISENBERG, S.C., a Wisconsin Service Corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the Employee Retirement Income Security Act of 1974 ("ERISA"), courts are powerless to make a beneficiary "whole" through an award of monetary damages for economic losses caused directly by a fiduciary's deliberate refusal to make a timely payment of pension benefits.

PARTIES BELOW

The names of all parties to the proceedings in the Seventh Circuit Court of Appeals appear in the caption of the case, excepting plaintiff, Kathaleen A. Bassler-Harsch, who does not join in this petition.

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PETITION FOR WRIT OF CERTIORARI

The above named Petitioners respectfully petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 956 F.2d 651 (7th Cir. 1992) and is reproduced in the Appendix to this Petition (App. 1-27). The opinions of the District Court are unreported and are also reproduced in the Appendix (App. 28-42).

JURISDICTION

The judgment of the Court of Appeals was entered on February 10, 1992, and amended on February 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 502 of ERISA, 29 U.S.C. Section 1132, provides in pertinent part:

> (a) Persons empowered to bring a civil action. A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan; . . .

STATEMENT OF THE CASE

1. Petitioners commenced this ERISA action to enforce rights provided to them under an ERISA plan instituted by Alan D. Eisenberg, S.C., a Milwaukee law firm. At all material times, respondent Alan D. Eisenberg was the president and sole director of the respondent law firm. At various times during 1986, the petitioners left their employment.[1] Prior to leaving the firm, all the petitioners were participants in the respondent Alan D. Eisenberg, S.C. Pension and Profit Sharing Plan (the Plan), of which Eisenberg was the sole named trustee and sole administrator (App. 2).

2. Beginning with Lisa Tallar in May of 1986, the petitioners made a number of requests to Eisenberg for information about and distribution of their benefits under the Plan. Tallar wrote to Eisenberg requesting payment of her benefits in May and July, and Paula Miller did the same in September. Neither received a response. Thomas Kuehl made oral requests for a distribution in July and September, which Eisenberg rebuffed with a variety of explanations and excuses why the benefits could not be paid at that time (App. 2-3).

3. In January of 1987, Kuehl began to make written requests on behalf of all the petitioners for Plan documents and distribution of benefits. The petitioners advised Eisenberg that according to the firm's Plan and practice, which had included a consistent pattern of payouts to other

[1] Douglas Bihler left in March, Lisa Tallar in April, Kathaleen Bassler Harsch in May, and Thomas Kuehl and Paula Miller in August.

departing employees, they were entitled to their benefits shortly after termination of their employment. These requests continued through September 3, 1987. Eisenberg rejected all of the petitioners' requests for Plan documents and distribution of benefits with increasing hostility and visible indifference. For example, on May 12, 1987, Eisenberg wrote to Kuehl:

> With respect to your pension and profit sharing accounts, we expect to be making a decision shortly as to whether or not we will be paying you off at age 59. Stay tuned.

On June 13, 1987, Eisenberg wrote:

> Kindly provide me with any authority that you may have that obligates me to pay you off before the year 2007. Unless you have some statutory, or contractual authority, please do not contact me before June 30, 2007.
>
> . . .
>
> As to meeting with you at 5:00 p.m. on Monday, June 15, 1987, I do not wish to get into any arguments with you. I understand Peking, China, is nice at this time of the year, and I might consider meeting with you there but only if you can speak Chinese.

And on August 28, 1987:

> We are presently in receipt of your August 24, 1987, letter. Thank you for the marvelous collection of dog sled stamps on the envelope. The thought of your staff putting their "little" tongues on the backs of those stamps is just mind boggling; boggle, boggle, boggle.

In this last letter, Eisenberg again refused the petitioners' request for payment and for documents regarding the Plan (App. 3).

4. Petitioners commenced this action in the United States District Court for the Eastern District of Wisconsin on November 24, 1987, seeking Plan documents and benefits, compensatory and punitive damages, attorney fees, and other relief (App. 4). Jurisdiction in the District Court was based upon Section 502(e) of ERISA, 29 U.S.C. Section 1132(e).

5. After filing an answer denying liability and asserting that Kuehl had been responsible for administering the Plan and that any alleged non-compliance with ERISA was a result of Kuehl's actions, the Respondents on December 24, 1987 notified the Petitioners that all accrued plan benefits sought by the petitioners would be paid. The first benefits were paid in January of 1988, with eventual distribution of all benefits due by April of 1988 (App. 4). Petitioners' other requests for relief remained unresolved.

6. The trial court afforded petitioners a jury trial and allowed them to pursue their claim for compensatory damages. At trial, the jury found that Eisenberg had breached his fiduciary duties to the petitioners by failing and refusing to pay them their plan benefits timely. The jury awarded $25,000.00 damages to Kuehl and $7,500.00 to each of the other petitioners (App. 4).

7. With the exception of Kuehl's award, the trial court subjected the damage awards to remittiturs on motions after verdict. The trial court determined that the petitioners had incurred direct compensatory damages as a result of Eisenberg's deliberate refusal to make timely payment of their pension benefits: Thomas Kuehl and Lisa Tallar-Kuehl suffered tax losses of $25,000.00 and $3,110.00, respectively, because the distribution of their pension benefits were improperly delayed until after the enactment of

the less favorable provisions of the Tax Reform Act of 1986[2].

Petitioner Bihler, who had recently opened up a new law practice, had insufficient funds to hire a secretary for a period of four months which limited the time he could devote to billable work and resulted in a loss of fee income determined by the trial court to be $4,800.00 (App. 32-33).

Petitioner Miller incurred additional interest expense on her credit card balance, which expense she would have paid off earlier had her Plan benefits been available. The trial court determined Miller's damages at $709.00 (App. 31).

8. On appeal, the United States Court of Appeals for the Seventh Circuit held that none of the petitioners' compensatory damages were allowable either under ERISA, Section 502(a)(1)(B), 29 U.S.C. Section 1132(a)(1)(B) (App. 6-10), nor as "other appropriate equitable relief" under ERISA, Section 502(a)(3)(B), 29 U.S.C. Section 1132(a)(3)(B) (App. 10-18). As to both statutory bases for recovery, the Court of Appeals found *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), dispositive (App. 6-8; App. 15, 18).

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[2] The computation of these losses were reflected in an exhibit (App. 43) introduced at trial and supported by the expert testimony of a certified public accountant. These economic losses were caused by Eisenberg's failure to distribute the benefits prior to the effective dates of the elimination of the ten-year, income averaging provision of the Internal Revenue Code and the implementation of a pension surtax on premature distributions of benefits. Kuehl's accountant identified these combined effects as "tax impact" in the foregoing exhibit.

The Court of Appeals noted the *Russell* Court's observation that ERISA Section 502(a)(1)(B) was silent as to extracontractual damages or the consequences of a delay in the plan administrator's processing of a disputed claim (App. 7). The Court of Appeals further declined to draw a distinction between the injuries in *Russell* which were essentially physical, and petitioners' injuries here which were solely financial in nature (App. 8). Elsewhere the Court of Appeals reiterated the *Russell* Court's concern with tampering with the ERISA enforcement scheme drafted with such evident care (App. 9).

In considering the allowance of petitioners' damages as "other appropriate equitable relief" under ERISA Section 502(a)(3), the Court correctly noted that the Supreme Court in *Russell* never addressed the availability of extracontractual damages under that section (App. 11). However, the Court observed that most circuits had followed the "*Russell* Court's reasoning" in rejecting all extracontractual damages under Section 502(a)(3)" (App. 11).

9. The Court of Appeals criticized the opposing authority found in the Sixth Circuit's decision in *Warren v. Society National Bank*, 905 F.2d 975 (6th Cir. 1990) as creating distinctions without a difference; while the Court below was technically accurate in stating that *Russell* did not deal with Section 502(a)(3), it nevertheless commented that the *Warren* decision "ignores some of the broader implications of the *Russell* Court's reasoning" (App. 14). Although the Court of Appeals was sympathetic to a broader remedy for the plaintiffs, it felt bound by *dicta* in *Russell*:

> Although we might be sympathetic to the finding of a broader remedy in Section 502, the *Russell dicta*, which commanded majority support in the Supreme Court and have generally carried the day in the Courts of Appeals seem to require us to reject extracontrac-

> tual remedies. While a broader remedial view might serve the ends of justice in the case before us, we do not think such a view is consistent with the reasoning of *Russell*. (App. 15).

10. The majority below indicates the Court of Appeals will continue to doubt the availability of "extracontractual" damages under ERISA "until a more plausible signal reaches us from above." (App. 18). The concurring opinion of Judge Flaum noted that he was neither "reluctant," nor "dubious," in denying extracontractual damages to plaintiffs. He found it highly improbable that the concluding paragraphs of *Ingersoll-Rand Company v. McClendon*, 111 S.Ct. 478, 486 (1990) would have been intended to abrogate the effects of *Russell* which had been a "cornerstone" barring extracontractual damages under ERISA:

> If the Court is intending to modify the state of the law in this area, it is doing so in a surprisingly murky manner. (App. 27).

REASONS FOR GRANTING THE PETITION

This case raises important issues concerning the power of federal courts to fashion remedies under ERISA's civil enforcement scheme. The Seventh Circuit herein has expressed "sympathy" with exercising that power, and even posits that the "ends of justice" herein would be served thereby (App. 7, 14-15), but is constrained by this Court's decision in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985). The decision below conflicts directly with this Court's decision in *Ingersoll-Rand Company v. McClendon*, ____ U.S. ____, 111 S.Ct. 478, 486 (1990), which held, *inter alia*, that the power of federal courts

is not limited under ERISA Section 502(a) merely to the recovery of "pension benefits," but that federal courts possess the power to grant other relief, which included, in *Ingersoll-Rand*, a request for compensatory damages.

In contrast to the Seventh Circuit decision herein, *Warren v. Society Nat. Bank*, 905 F.2d 975 (6th Cir. 1990), would allow recovery of monetary damages as "other appropriate equitable relief" under ERISA Section 502. In *Warren*, the plan trustee failed to follow the participant's instructions to pay his benefits in one calendar year resulting in the loss of tax benefits that could be derived from "rolling over" the monies into an IRA or another qualified employer plan. In accord with *Warren* is the recent Ninth Circuit decision in *Carich v. James River Corp.*, 958 F.2d ____, 14 EBC 2760 (1992), which awarded monetary damages to a plan beneficiary directly arising from the fiduciary's delay in following the beneficiary's instructions regarding the sale of stock.

However, in accord with the Seventh Circuit decision herein is the recent Eighth Circuit decision in *Novak v. Andersen Corp.*, 60 U.S.L.W. 2643, decided April 9, 1992 (denial of "extracontractual" damages arising from administrator's failure to provide written notice of "roll-over" option, specifically rejecting the *Warren* rationale).

The above conflict in the decisions of the Seventh and the Eighth Circuits with the decisions of the Sixth and Ninth Circuits demonstrates the necessity of this Court to provide guidance on an important federal question affecting the power of federal courts to fashion remedies under ERISA law. The need is particularly compelling because under ERISA Section 514(a), exclusive jurisdiction is placed in the federal courts to create a single body of federal common law regulating benefit plans and fiduciary

conduct. The doubt and confusion existing within the Circuits as to the power of federal courts to award monetary relief impedes the effort to establish a uniform body of ERISA law, and further, as in the instant case, would leave claimants without a remedy to redress wrongs done in contrast to this Court's recent decision in *Franklin v. Gwinnett Cy. Pub. Schools*, 503 U.S. ____, 117 L.Ed.2d 208 (1992). Accordingly, this Court's immediate review is necessary.

I.

THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT AND THE PERTINENT DECISIONS OF OTHER COURTS OF APPEALS.

The fundamental issue dividing the various courts of appeals herein is whether a federal court possesses the power to grant monetary damages as part of "make whole" compensatory relief under ERISA. Petitioners sought recovery under two statutory bases: (1) ERISA Section 502(a)(1)(B) on the grounds that petitioners were enforcing their right to prompt and timely payment under "the terms of the plan," and further under Section 502(a)(3) on the grounds that the economic losses suffered herein constitute "other appropriate equitable relief" under ERISA Section 502(a)(3) (App. 5). Relying heavily on *Massachusetts Mutual Ins. Co. v. Russell, supra*, the court below held that it was powerless to grant the relief requested.

The Eighth Circuit case of *Novak v. Andersen Corp.*, 60 U.S.L.W. 2643, decided on April 9, 1992, held that that court was powerless to award damages arising from the failure of the Plan to provide the plaintiff with a notice of his "roll-over" rights, a disclosure which is required

under ERISA. *Novak* argued that the appropriate equitable relief due him under ERISA Section 502(a)(3)(B) was monetary damages. The Eighth Circuit interpreted "other appropriate equitable relief" to mean the ability to award declaratory or injunctive relief, but not monetary, "make whole" damages. *Id.* at 2644. Furthermore, the Eighth Circuit found *Massachusetts Mutual Life. Ins. Co. v. Russell, supra,* persuasive in rejecting "extracontractual" damages. *Id.*

In support of petitioners' contention that they have a right to timely distributions as a "Plan benefit" under ERISA, and therefore a claim for monetary damages under Section 502(a)(1)(B) is the Ninth Circuit case of *Carich v. James River Corp.*, 985 F.2d ____, 14 EBC 2760, decided on February 3, 1992. In that action, it was alleged that the employer in contravention of the terms of the plan unreasonably delayed the sale of the participant's stock, thereby causing a loss of $24,000.00, which represented the difference between the value of the stock when it was eventually sold and the value at the time when the participant reasonably expected the transfer to take place. The Ninth Circuit afforded relief to the participant, holding that the employer's failure to act with due diligence was arbitrary and capricious and violated its contractual obligations to the participant. Furthermore, the Ninth Circuit held that the failure to afford relief would provide the plan with unlimited discretion in handling plan transfers, contrary to the principles underlying ERISA. *Carich,* 14 EBC at 2761.

With regard to monetary damages under ERISA Section 502(a)(3), *Warren v. Society Nat. Bank,* 905 F.2d 975 (6th Cir. 1990) is directly analogous to petitioners' claim in this case. In *Warren,* the Court of Appeals reversed

the District Court and distinguished *Russell* in two respects: (1) *Russell* involved a different statutory provision (ERISA Section 409) and had no occasion to consider Section 502(a)(3) of ERISA, and (2) the participant in *Warren* sustained direct contractual damages because of the loss of tax benefits arising out of the fiduciary's breach of his duties to comply with the participant's instructions regarding the payment of his benefits. *Id* at 982. Importantly, the *Warren* court adopted Justice Brennan's conclusion in *Russell*, derived from the law of trusts, which indicated that a beneficiary is entitled to a remedy "which will put him in the position he would have been in if the fiduciary had not committed a breach of trust" and further indicated that such a remedy included monetary damages. 905 F.2d at 982, citing *Russell, supra*, 473 U.S. at 154 n.10, 157 n.16.

Upon writ of certiorari to this Court in *Warren*, this Court invited the Solicitor General to submit its *amicus curiae* brief to express the views of the United States. The United States urged this Court to deny the grant of the writ of certiorari on the ground that monetary damages were within the remedies available to federal courts under ERISA and that the *Warren* decision was not inconsistent with *Russell*.[3]

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[3] As the Solicitor General's brief stated in pertinent part:

"In our view, the court of appeals correctly decided that Section 502(a)(3) authorizes federal courts to award make-whole relief to participants and beneficiaries for foreseeable losses that result directly from the breach of the terms of a plan or from a violation of one of ERISA's substantive requirements. Such authority, we believe, is embraced within the power to grant 'other appropriate equitable relief' because that phrase is not limited to injunctions and declaratory judgments; rather it extends to the range

(Footnote continued on following page)

In *Ingersoll-Rand, supra,* this Court held that "there is no basis in Section 502(a)'s language for limiting ERISA actions to only those which seek "pension benefits." 111 S.Ct. at 486. The Court added:

> It is clear that the relief requested [which included a prayer for compensatory damages] is well within the power of federal courts to provide. *Id.*

In other Section 502(a)(3) cases involving interference with the attainment of benefits under an ERISA plan, federal courts have awarded make-whole relief including back pay, front pay, restitution of forfeited benefits, and prejudgment interest. See *Vogel v. Independence Fed. Sav. Bank,* 692 F.Supp. 587, 596 (D. Md. 1988); *Folz v. Marriott Corp.,* 594 F.Supp. 1007, 1015-1020 (W.D. Mo. 1984); *Bittner v. Sadoff & Rudoy Indus.,* 490 F.Supp. 534, 536 (E.D. Wis. 1980).

In *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989), an action seeking benefits under Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B), this Court decided that a *de novo*

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[3] *continued*
of remedies developed by courts of equity in the enforcement and administration of trusts. And embraced within these remedies are monetary damages arising from breaches by fiduciaries of their contractual commitments.

"That conclusion is not inconsistent with the Court's decision in *Russell* and does not conflict with the decisions of the courts of appeals that have held unavailable under Section 502(a)(3) types of damages not normally regarded as flowing directly from a breach of a fiduciary obligation or the terms of an employee benefit plan, *e.g.,* punitive damage awards, awards for emotional distress, and awards for certain other forms of extra-contractual damages. Further review by this Court is therefore not warranted." *Amicus Curiae of the United States, Society National Bank v. Warren,* pgs. 5-6.

Because of the similarity of issues herein and *Warren,* petitioners have extensively relied on the position of the United States therein.

standard of review would apply with respect to a trustee's interpretations of the terms of a plan, stating that since "ERISA abounds with the language and terminology of trust law," it would be "guided by principles of trust law" in reaching its conclusion. 489 U.S. at 110, 111.

However, contract law is also important because ERISA was enacted "to protect contractually defined benefits," *Russell, supra*, 473 U.S. at 148, and, in the absence of ERISA, state contract law would govern. *Firestone*, 49 U.S. at 112-113. As indicated in *Firestone*, any interpretation of Section 502(a) that limits participants and beneficiaries to more restricted remedies than contract law would provide is suspect. 489 U.S. at 114.

The decision below rejecting the availability of monetary damages under "other appropriate equitable relief" is substantially premised on the Ninth Circuit decision in *Sokol v. Bernstein*, 803 F.2d 532 (1986) (App. 10-12). The *Sokol* Court refused to authorize punitive damage awards under Section 502(a)(3) and said that "Congress used the word 'equitable' to mean what it usually means—injunctive or declaratory relief." *Id.* at 537.

As noted by the Solicitor General in *Warren*, this construction is implausible for a number of reasons.

First, this construction would virtually read "other appropriate equitable relief" out of the statute. Section 502(a)(1)(B) authorizes declaratory judgment actions and coercive relief by providing that any participant or beneficiary may bring suit "to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." In addition, Section 502(a)(3)(A) authorizes courts "to enjoin any act or practice which violates any provision of this [title] or the terms of the plan." Thus, the phrase "other appropriate equitable relief," if it is

to have any significance, must authorize equitable remedies in addition to injunctions and declaratory judgments.

Secondly, in *Ingersoll-Rand* this Court recognized that Section 502(a)(3) does not have the restricted meaning as suggested by the *Sokol* Court. 111 S.Ct. at 486. That conclusion follows naturally from the fact that Section 502(a)(3) is the broadest provision in the comprehensive enforcement scheme set forth in Section 502(a). While the other provisions of Section 502(a) are narrowly focused on matters such as benefit claims, fiduciary breaches, and violations of ERISA's disclosure provisions, Section 502(a)(3) provides for relief to redress "any act or practice which violates any provision of this title or the terms of the plan." Thus, for example, participants alleging interference with the attainment of benefits under a plan in violation of Section 510—the sort of violation that was at issue in *Ingersoll-Rand*—are authorized to sue under Section 502(a)(3). As this Court recognized, 111 S.Ct. at 486, in the case of an employee who was fired so that his pension benefits would not vest, "other appropriate equitable relief" must extend beyond injunctive and declaratory relief. In appropriate cases, back pay, front pay, and other sorts of damages should be available.[4]

Third, in *Firestone* this Court rejected an interpretation of Section 502(a) that "would afford less protection to employees and their beneficiaries than they enjoyed

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[4] Title VII's authorization of "back pay * * * or any other equitable relief the court deems appropriate" (42 U.S.C. 2000e-5(g)) has been construed to authorize such damages, but not other types of "extracontractual" relief. See, *e.g.*, *Carroll v. General Acc. Ins. Co.*, 891 F.2d 1174, 1177 (5th Cir. 1990) (no pain and suffering award); *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 889-890 (3rd Cir. 1984) (front pay award affirmed); see generally P. Cox, *Employment Discrimination* 23-1 to 23-14 (1988).

before ERISA was enacted." 489 U.S. at 114. The *Sokol* construction of Section 502(a)(3) would have precisely that effect. "Actions challenging an employer's denial of benefits before the enactment of ERISA were governed by principles of contract law." *Firestone*, 489 U.S. at 112. Under contract law, damages are intended "to place the aggrieved party in the same economic position he would have had if the contract had been performed." J. Calamari & J. Perillo, *The Law of Contracts* Section 14-4, at 591 (3d ed. 1987); see also *Restatement of Contracts* Section 329 (1932), *Restatement (Second) of Contracts* Section 347 (1981); 5 A. Corbin, *Corbin on Contracts*, Section 992, at 5-7 (1964); 11 S. Williston & Jaeger, *Williston on Contracts* Section 1338, at 197-203 (3d ed. 1968). Contract law thus provides for a make-whole remedy.

Under the classic formulation of contract damages, an aggrieved party may recover the damages directly stemming from a breach of contract if the damages were foreseeable. *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854). That condition is satisfied when the damages "may fairly and reasonably be considered * * * arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself" or when they "may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." 156 Eng. Rep. at 151; see J. Calamari & J. Perillo, *supra*, Section 14-5, at 594; see also *Restatement (Second) of Contracts*, *supra*, Section 351. Moreover, the general rule is that the extent of the losses must be reasonably certain to be recoverable. J. Calamari & J. Perillo, *supra*, Section 14-8, at 599-66.[5]

[5] Because foreseeability and reasonable certainty are limitations on recoveries for breach of contract, the damages available in a

(Footnote continued on following page)

In the instant case, the petitioners' expectation interest was both foreseeable and reasonably certain. Tax benefits permeate the formation, administration and participation in pension plans. As in *Warren*, the timing and manner of distribution of pension benefits are taxable events that have a substantial impact on the value of those benefits. The Plan's provisions allowing the participants the opportunity to elect both the time of payment of their benefits and the manner of payment constitutes a recognition by the trustee and participants that the tax laws at the time of distribution will have substantial impact on the value of the benefit received. Accordingly, the tax benefits at time of payment, or the tax penalties, "may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract," and the loss of these advantages was a "probable consequence of the breach." *Hadley v. Baxendale*, 156 Eng. Rep. at 151.

Likewise, the loss of income by Petitioners Bihler and Miller were directly related to an expectation that these funds would be available for their immediate uses, which involved the funding of a law practice and the payment of consumer debt, respectively.

Under *Firestone*, Section 502(a)(3) should also be construed with reference to principles of trust law developed by courts of equity. Since 502(a)(3) speaks of "other appropriate *equitable* relief * * * to *redress*" violations of

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[5] *continued*
contract action differ from the liability imposed in tort for all the damages proximately caused by the tortfeasor. See W. Prosser & P. Keeton, *The Law of Torts* Section 92, at 665 (5th ed. 1984). As a rule, damage for emotional distress—which are generally available in a tort action—are not recoverable in a contract action. Nor are punitive damages. *Ibid.*; J. Calamari & J. Perillo, *supra*, Sections 14-3, 14-5(b), at 595-596.

the Act or the terms of a plan, the provisions of Section 199 of the 1 *Restatement (Second) of Trusts* 437 (1959) (entitled "*equitable* remedies of beneficiary"), and especially Section 199(c) (providing for a suit "to compel the trustee to *redress* a breach of trust"), *are* particularly relevant. 1 *Restatement (Second) of Trusts* 437 (1959) (emphasis added). Section 199(c) provides damages as an "equitable" remedy in appropriate cases: the comment of Section 199(c), referencing Section 205 of the *Restatement*, explains that a "beneficiary can maintain a suit to compel the trustee to redress the breach of trust." 1 *Restatement (Second) of Trusts* 438 (1959). Section 205 provides monetary relief exclusively—in each of the ten examples illustrating this section a trustee is required to pay money to a beneficiary.

Moreover, like the traditional contract remedy, Section 205 provides make-whole relief. It provides that a beneficiary has "the option of pursuing a remedy which will put him in the position in which he was before the trustee committed the breach of trust" or "of pursuing a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust." 1 *Restatement (Second) of Trusts* 458 (comment a) (1959). Thus, "the general rule [is] that the object of damages is to make the injured party whole, that is, to put him in the same condition in which he would have been if the wrong had not been committed and the trustee had done his duty. Both direct and consequential damages may be awarded." G. Bogert & G. Bogert, *The Law of Trusts and Trustees* Section 701, at 198 (1982) (liability for breach of investment duties).[6] Accord, *Russell*, 473 U.S.C. 134 at

[6] For illustrative purposes, the treatise cites *Estate of Talbot*, 141 Cal. App. 2d 309, 296 P.2d 848 (Ct. App. 1956), in which the trustees were liable for a breach that imposed a capital gains tax burden on the beneficiaries of a trust.

157 (Brennan, J., concurring); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-419 (1975).

In summary, construing Section 502(a)(3) to provide a remedy that makes participants and beneficiaries whole for losses directly and foreseeably resulting from violations of the statute or the terms of a plan is particularly appropriate in the case of employee benefit plans because such a plan has a dual character as both a contract and a trust.

It bears emphasis that Congress's intent was for "courts * * * to develop a 'federal common law of rights and obligations under ERISA-regulated plans.' " *Firestone*, 489 U.S. at 110, quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987); see also *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983); 120 Cong. Rec. 29,942 (1974) (remarks of Sen. Williams); see Report of the Comm. on the Budget, H.R. 3299, 101st Cong., 1st Sess. 55-56 (1989). In fact, Congress expressly intended all actions brought under ERISA "to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974), *reprinted in III Leg. Hist.* 4594. Section 301, of course, not only confers jurisdiction on the federal courts, but also mandates recognition and development of a substantive law of labor contracts. *Pilot Life*, 481 U.S. at 55-56; see *Smith v. Evening News Ass'n*, 371 U.S. 195, 199-200 (1962); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-457 (1957). Thus, as this Court indicated in *Firestone*, although "ERISA abounds with the language and terminology of trust law" (489 U.S. at 110), that law is not mutually exclusive of contract law. Rather, in the context of construing ERISA plans and "deal[ing] with issues involving the rights and obligations under private welfare

and pension plans" (*Franchise Tax Bd.*, 463 U.S. at 24 n.26), the trust law incorporated into ERISA is built on a solid foundation of contract law.

Moreover, in enacting ERISA, Congress recognized that "the typical employee benefit plan, covering hundreds or even thousands of participants, is quite different from the testamentary trust both in purpose and in nature." S. Rep. No. 127, 93d Cong., 1st Sess. 29 (1973), *reprinted in I Legislative History of the Employee Retirement Income Security Act of 1974*, at 615 (Comm. Print 1976) [*Leg. Hist.*]; H.R. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973), *reprinted in II Leg. Hist.* 2359. Congress therefore expected the courts to adapt traditional trust law, "bearing in mind the special nature and purposes of employee benefit plans intended to be effectuated by the Act." *Ibid.* The goal was to equip a participant with the legal tools "to safeguard either his own rights or the plan assets." *Ibid.* "[I]n enacting ERISA Congress made *more* exacting the requirements of the common law of trusts relating to employee benefit trust funds." *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984) (emphasis added); see *Sinai Hosp. of Baltimore, Inc. v. National Benefit Fund for Hosp. & Health Care Employees*, 697 F.2d 562, 565 (4th Cir. 1982). A remedy that makes participants and beneficiaries whole for losses directly and foreseeably resulting from the breach of the terms of a plan—the remedy that would have been available in the absence of ERISA—is accordingly warranted under Section 502(a)(3).

Petitioners submit the *Warren* decision is not contrary to *Russell* because *Warren* concerns only the recovery of damages that would be available in a traditional contract action, rather than the extracontractual damages that *Russell* rejected. In *Russell* these damages included punitive

damages and damages arising from an aggravation of a psychological condition. 473 U.S. at 137. Punitive damages and damages for emotional distress are not traditional contract remedies. Accordingly, the appellate cases involving claims for punitive damages, damages for emotional distress or similar injury are distinguishable from *Warren*.[7]

II.

RESOLUTION OF THIS CONFLICT IS OF SUBSTANTIAL IMPORTANCE IN THE ADMINISTRATION OF THE CIVIL ENFORCEMENT REMEDIES OF ERISA.

The Seventh Circuit herein acknowledges the wrong done, but asserts that it is powerless to provide a remedy, citing *Massachusetts Mutual Life Ins. Co. v. Russell, supra.*

As this Court recently stated in *Franklin v. Gwinnett Cy. Pub. Schools, supra*, 503 U.S. ____, 117 L.Ed.2d 208, citing *Bell v. Hood*, 327 U.S. 678, 684 (1946):

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[7] See *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819, 820 (11th Cir. 1991) (seeking damages for emotional distress, embarrassment, humiliation, and damage to financial reputation); *Davis v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689, 696-697 (6th Cir. 1989) (punitive damages), cert. denied, 110 S.Ct. 1924 (1990); *Amos v. Blue Cross-Blue Shield*, 868 F.2d 430, 431 (11th Cir.), cert. denied, 110 S.Ct. 158 (1989) (punitive and unspecified "extracontractual" damages); *United Steelworkers v. Connors Steel Co.*, 855 F.2d 1499, 1508-1509 (11th Cir. 1988) (unspecified "extracontractual" damages), cert. denied, 489 U.S. 1096 (1989); *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 824-825 (1st Cir.) (punitive and "extracontractual" damages for misrepresentation), cert. denied, 488 U.S. 909 (1988); *Varhola v. Doe*, 820 F.2d 809, 817 (6th Cir. 1987) (punitive damages; *Sokol v. Bernstein*, 803 F.2d at 534-539 (punitive damages); *Hancock v. Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302, 1306-1307 (9th Cir. 1986) (unspecified "extracontractual" damages); *Powell v. Chesapeake & Potomac Tel. Co.*, 780 F.2d 419, 424 (4th Cir. 1985), (punitive damages and damages for emotional distress), cert. denied, 476 U.S. 1170 (1986).

> [W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. *Id.* 117 L.Ed. at 217.

The federal judiciary will continue to experience conflict among the various circuits and at the district court level until this Court provides guidance as to the availability of compensatory "make whole" damages under ERISA.

CONCLUSION

For the above stated reasons, this Court should grant the petition for writ for certiorari.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 90-3169, 90-3303

KATHALEEN A. BASSLER HARSCH, DOUGLAS M. BIHLER, THOMAS D. KUEHL, PAULA C. MILLER, and LISA P. TALLAR-KUEHL,

Plaintiffs-Appellees, Cross-Appellants,

v.

ALAN D. EISENBERG, Individually and as Trustee and Administrator of the Alan D. Eisenberg, S.C. Pension and Profit Sharing Plan, and as President and Sole Director of Alan D. Eisenberg, S.C.; THE ALAN D. EISENBERG, S.C. PENSION AND PROFIT SHARING PLAN; and ALAN D. EISENBERG, S.C., a Wisconsin service corporation,

Defendants-Appellants, Cross-Appellees.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 87 C 1345—**J. P. Stadtmueller,** *Judge.*

ARGUED SEPTEMBER 6, 1991—DECIDED FEBRUARY 10, 1992

Before CUDAHY and FLAUM, *Circuit Judges*, and ROSZKOWSKI, *Senior District Judge.**

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* Honorable Stanley J. Roszkowski, Senior District Judge of the United States District Court for the Northern District of Illinois, sitting by designation.

CUDAHY, *Circuit Judge.* The principal question presented by this appeal is whether either extracontractual compensatory or punitive damages may be recovered by a beneficiary in an action for breach of fiduciary duty under ERISA. The district court held that punitive damages were not available in such an action, but that the compensatory damages sought by the plaintiffs were. We affirm the district court's holding as to punitive damages, but reverse on the issue of compensatory damages. We also affirm the denial of sanctions under Fed. R. Civ. P. 11, and vacate and remand the rulings on attorney's fees and sanctions under ERISA.

I.

This remarkably vexatious litigation arose out of a dispute between defendant Alan D. Eisenberg and some of his former employees over the distribution of the employees' pension benefits. Eisenberg is the president and sole director of defendant Alan D. Eisenberg, S.C., a Milwaukee law firm. The plaintiffs are former employees of the firm who left at various times during 1986.[1] Prior to leaving the firm, all were participants in the Alan D. Eisenberg, S.C. Pension and Profit Sharing Plan (the Plan), of which Eisenberg was and is the named trustee and administrator.

Beginning with Lisa Tallar (now Tallar-Kuehl) in May of 1986, the plaintiffs made a number of requests to Eisenberg for information about and distribution of their benefits under the Plan. Tallar wrote to Eisenberg requesting payment of her benefits in May and July, and Paula Miller did the same in September. Neither received a response. Thomas Kuehl made oral requests for a distribution in July and September, which Eisenberg rebuffed with a

[1] Douglas Bihler left in March, Lisa Tallar in April, Kathaleen Bassler Harsch in May, and Thomas Kuehl and Paula Miller in August.

variety of explanations and excuses why the benefits could not be paid at the time in question.

In January of 1987, Kuehl began to make written requests on behalf of all the plaintiffs for Plan documents and distribution of benefits. These requests continued through September 3, 1987. Eisenberg rebuffed all the requests, with increasing hostility.[2] The plaintiffs contended that according to the firm's practice and policy they were entitled to their benefits shortly after their departures from the firm. Eisenberg responded that the plaintiffs were not entitled to any payment until they reached retirement age (59 years), and demanded that the plaintiffs produce some "statutory, or contractual, authority" for their demands for information and benefits.

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[2] For example, on May 12, 1987, Eisenberg wrote to Kuehl:

> With respect to your pension and profit sharing accounts, we expect to be making a decision shortly as to whether or not we will be paying you off at age 59. Stay tuned.

On June 13, 1987, Eisenberg wrote:

> Kindly provide me with any authority that you may have that obligates me to pay you off before the year 2007. Unless you have some statutory, or contractual, authority, please do not contact me before June 30, 2007.
>
> . . . .
>
> As to meeting with you at 5:00 p.m. on Monday, June 15, 1987, I do not wish to get into any arguments with you. I understand Peking, China, is nice at this time of the year, and I might consider meeting with you there but only if you can speak Chinese.

And on August 28, 1987:

> We are presently in receipt of your August 24, 1987, letter. Thank you for the marvelous collection of dog sled stamps on the envelope. The thought of your staff putting their "little" tongues on the backs of those stamps is just mind boggling; boggle, boggle, boggle.

Not surprisingly, this letter went on to refuse the plaintiffs' requests for payment and for documents regarding the Plan.

The plaintiffs filed this lawsuit against Eisenberg, Alan D. Eisenberg, S.C. and the Plan on November 24, 1987. The complaint alleged that Eisenberg had refused to comply with the plaintiffs' written requests for information and claims for benefits, in violation of the terms of the Plan, the policy and practice of the firm and ERISA. In addition to Plan documents and benefits, the plaintiffs sought compensatory and punitive damages. On December 16, the defendants filed their answer, in which they denied all liability, asserted that Kuehl had been responsible for administering the Plan and that therefore any alleged noncompliance with ERISA was a result of his actions, and requested costs and fees under Rule 11. Nevertheless, on December 24, 1987, the defendants notified the plaintiffs that all of the benefits sought by the plaintiffs would be paid. The plaintiffs received their first payment of benefits in January of 1988 (the defendants had offered to make payments in December, but the plaintiffs rejected the offer for tax reasons). Distribution was largely completed by March, with a few minor adjustments in April.

The defendants continued to deny liability for compensatory or punitive damages, and in April filed a counterclaim against Kuehl alleging that he had been a fiduciary with respect to the Plan during his employment with the firm and that he had breached his duties as a fiduciary by failing to ensure that the Plan complied with its obligations under ERISA. The defendants also moved to dismiss the complaint on the ground that neither compensatory nor punitive damages are available in an action brought by individual beneficiaries under ERISA. The court denied the motion to dismiss the compensatory damages claim, but agreed with the defendants that punitive damages could not be recovered under ERISA, and dismissed the plaintiffs' claim for such damages. The claim for compensatory damages and the counterclaim against Kuehl were tried to a jury over the defendants' objection. The jury ruled for the plaintiffs on both issues, and awarded $7,500 each to Tallar, Miller, Douglas Bihler and Kathaleen Bassler Harsch, and $25,000 to Kuehl. On the defendants' mo-

tion, all the awards except Kuehl's were subjected to substantial remittiturs on the ground that they bore no reasonable relationship to the evidence.

II.

The civil enforcement provisions of ERISA appear in section 502(a) of the statute. That section provides in pertinent part:

> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> . . .
>
> (3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a) (1988). The plaintiffs argue that both extracontractual compensatory and punitive damages are recoverable under either section 502(a)(1)(B) or section 502(a)(3)(B). The defendants contend that neither type of relief is available under any provision of section 502. We deal with each type of damages in turn.

A. *Compensatory Damages*

The plaintiffs in this case sought a variety of damages that arose from the defendants' delay in payment of their benefits. Paula Miller claimed that she incurred additional interest expense on her credit card balance, which she would have paid off earlier if she had received the benefits due her from the Plan. Tom Kuehl and Lisa Tallar-Kuehl

testified that the delay in payment caused their distributions to be subject to the less favorable provisions of the then-new Tax Reform Act of 1986. Douglas Bihler claimed that the delay forced him to forgo hiring a secretary for his new law practice for four months, which limited the time he could devote to billable work and resulted in a loss of income.[3] The defendants argue that all of these damages are extracontractual in nature and therefore not recoverable under either section 502(a)(1)(B) or section 502(a)(3) of ERISA.[4]

1. Section 502(a)(1)(B)

In *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), a beneficiary of an ERISA-governed employee benefit plan sued the plan administrator for compensatory and punitive damages arising out of the administrator's delay in processing her claim for disability benefits. The Ninth Circuit found that the petitioner had stated a cause of action under section 409(a) of ERISA that could be asserted by a beneficiary under section 502(a)(2). The Supreme Court reversed, holding that "extracontractual dam-

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[3] The other plaintiff, Kathaleen A. Bassler Harsh, offered no evidence of any actual loss resulting from the delay in distribution of her benefits.

[4] The district court did not explicitly state under which provision of section 502 the plaintiffs' compensatory damages were recoverable. In addressing the plaintiffs' demand for jury trial, however, the court stated:

> Plaintiffs' jury trial right arises solely under 29 U.S.C. § 1132(a)(1)(B). Other ERISA provisions providing for civil enforcement appear inapplicable (see above discussion of 29 U.S.C. § 1132(a)(2)) or do not afford a right to jury trial. *See, e.g., Cox v. Keystone Carbon Co.*, 861 F.2d 390 (3d Cir. 1988).

Order at 6 (Jan. 23, 1989). *Cox* holds that there is no right to a jury in a case brought under section 502(a)(3). Since the district court held that the plaintiffs in this case *were* entitled to a jury trial on their claims for compensatory damages, the court must have understood those claims to arise under section 502(a)(1)(B).

ages caused by improper or untimely processing of benefit claims," *id.* at 136, may not be recovered in an action brought by a beneficiary to redress a violation of section 409(a).

The *Russell* Court did not expressly consider whether extracontractual damages might be available under ERISA section 502(a)(1)(B). Nevertheless, its opinion has important implications for that issue. In support of its holding, the *Russell* Court made the following observation:

> Significantly, the statutory provision explicitly authorizing a beneficiary to bring an action to enforce his rights under the plan—§ 502(a)(1)(B) . . . —says nothing about the recovery of extracontractual damages, or about the possible consequences of a delay in the plan administrators' processing of a disputed claim. Thus, there really is nothing in the statutory text to support the conclusion that such a delay gives rise to a private right of action for compensatory or punitive relief.

Id. at 144. The Court also found that, in light of ERISA's carefully crafted remedial scheme, the complete absence in section 502(a) of any mention of extracontractual damages demonstrates Congress' deliberate intent not to afford such a remedy:

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.

Id. at 146-47 (citation omitted) (emphasis in original).

We can see—particularly as illustrated by the case at bar—good reasons to allow beneficiaries to recover extracontractual damages under ERISA. But the Fourth Circuit, relying on *Russell*, has held that extracontractual compensatory damages are not available under section 502(a)(1)(B). *See Reinking v. Philadelphia American Life Ins. Co.*, 910 F.2d 1210 (4th Cir. 1990) (denying claim for

extracontractual damages for emotional distress). Although the policy implications in cases such as the one before us may be troubling, we have no choice but to agree. Any other conclusion would appear to be at odds with the plain meaning of the Supreme Court's statements in *Russell*. Another interpretation would also seem to do some violence to the language of section 502(a)(1)(B), which appears to limit beneficiaries to *contractual* claims by providing only for actions based upon or arising "under the terms of the plan."

The question, then, is whether the plaintiffs' damage claims in this case are "extracontractual" within the meaning of *Russell*. The plaintiffs argue that their claims are within the scope of section 502(a)(1)(B) because the plaintiffs are attempting to enforce their right "under the terms of the plan" to "proper treatment by the plan fiduciary under 29 U.S.C. § 1104(a)(1)." We reluctantly conclude, however, that the plaintiffs' damages in this case cannot be distinguished in any principled way from those claimed by the plaintiff in *Russell*, and are therefore not recoverable under section 502(a)(1)(B).

The *Russell* plaintiff alleged that the plan administrator's improper interruption of her benefit payments "forced [her] disabled husband to cash out his retirement savings which, in turn, aggravated the psychological condition that caused [her] back ailment." 473 U.S. at 137. Thus, like the plaintiffs in this case, she sought compensation for injuries that resulted directly from the administrator's alleged breach of fiduciary duty. The plaintiffs try to draw a distinction between their injuries and Russell's based on the fact that Russell's injuries were physical while their own are financial. But this fact does not make the plaintiffs' claims any more "contractual" than those in *Russell*. The Court did not consider Russell's claims "extracontractual" on the theory that they sought compensation for physical injuries, but because they were distinct from the "benefits to which she [was] contractually entitled," which she had already received. *Id.* at 136. The same is true of the plaintiffs' claims in the case before

us. The plaintiffs' attempt to characterize their suit as seeking to enforce a contractual right to "proper treatment" under the terms of the Plan is ingenious. But the *Russell* claim was susceptible of precisely the same characterization: the plan administrator there had the same fiduciary duty as the administrator here, and hence the plaintiff had the same right to proper treatment. In neither case did the "terms of the plan" entitle beneficiaries to compensatory damages resulting from a delay in payment of benefits.

Finally, we do not think it appropriate to find an *implied* remedy of compensatory damages in this case. The *Russell* Court explicitly cautioned against implication of remedies under ERISA:

> We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA. . . . "[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it."

Id. at 147 (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979)). The Court has also emphasized in other decisions its strong opposition to the judicial expansion of ERISA's remedies or causes of action. In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), the Court held that ERISA preempted plaintiff's state law tort and contract damage claims arising from the allegedly improper processing of his benefit claim. In so holding, the Court stated:

> In sum, the detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and

> beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

Id. at 54; *see also Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987). Therefore, we believe that extracontractual compensatory damages, such as those sought by the plaintiffs here, are not available in an action by an individual beneficiary under section 502(a)(1)(B).

2. Section 502(a)(3)

We are also dubious about the plaintiffs' contention that their claims for extracontractual damages are sustainable as "other appropriate equitable relief" under ERISA section 502(a)(3). Compensatory damages are a classic form of *legal*, not equitable, relief. In its report on ERISA, the Senate Finance Committee discussed "appropriate equitable relief" in the following terms:

> Appropriate equitable relief may be granted in a civil action. For example, injunctions may be granted to prevent a violation of fiduciary duty, and a constructive trust may be imposed on the plan assets . . . . Also, the bill specifically provides that a fiduciary may be removed through civil action brought by the Secretary or participants or beneficiaries . . . .

S. Rep. No. 383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. C.C.A.N. 4890, 4989. Based in part on this passage, the Ninth Circuit has held that "appropriate equitable relief" under section 502(a)(3) does not include extracontractual compensatory damages. *See Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986). As the court stated in that case:

> [I]t appears that Congress used the word "equitable" to mean what it usually means—injunctive or declaratory relief. The [Senate Finance Committee's] definition of "appropriate equitable relief" lists three distinct remedies (injunction, constructive trust, and removal), all of which are closely tied to the plan. For

> us to add an extra-contractual remedy to a list of remedies so strongly contractual in nature would be to step beyond the province of the judiciary and into that of the legislature.

Id. at 537-38. The First Circuit has also ruled that "other appropriate equitable relief" does not encompass a beneficiary's claim for extracontractual damages. *See Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 824 (1st Cir.), *cert. denied*, 488 U.S. 909 (1988); *see also Powell v. Chesapeake & Potomac Tel. Co.*, 780 F.2d 419, 424 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986) (rejecting plaintiff's argument that beneficiaries may seek extracontractual damages from a fiduciary as "other appropriate equitable relief" under traditional principles of trust law which Congress intended to engraft upon ERISA).

The Supreme Court has never addressed the availability of extracontractual damages under section 502(a)(3). In fact, the Court specifically reserved that question in *Russell*. Nevertheless, most circuits have found much of the *Russell* Court's reasoning in holding that extracontractual damages are not available under ERISA section 409(a) equally applicable to section 502(a)(3). With one exception, every circuit that has addressed the issue since *Russell* has held that extracontractual damages may not be recovered under section 502(a)(3). *See McRae v. Seafarers' Welfare Plan*, 920 F.2d 819, 821 (11th Cir. 1991); *Drinkwater*, 846 F.2d at 824; *Sokol*, 803 F.2d at 538; *Powell*, 780 F.2d at 424. *See also Forys v. United Food & Commercial Workers Int'l Union*, 829 F.2d 603, 604 n.2 (7th Cir. 1987) (dicta); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1464 (5th Cir. 1986) (dicta).

The Ninth Circuit's opinion in *Sokol* (whatever may be our view of the outcome) makes some telling points. The *Sokol* court first noted that section 502(a)'s "other appropriate equitable relief" clause is strikingly similar to section 409(a)'s "other appropriate equitable or remedial re-

lief" clause, under which the Supreme Court in *Russell* refused to infer a cause of action for extra-contractual damages. The court also found "considerable support in *Russell* for the proposition that no provision in ERISA authorizes the award of extra-contractual damages." *Sokol*, 803 F.2d at 535. In particular, the court noted that "*Russell* held that the fiduciary duties set forth in § 409 run only to the plan, and not to individual beneficiaries. In so holding, the *Russell* Court used language implying that *all* of the statute's provisions relating to fiduciary duties run only to plans, and not to beneficiaries as individuals." *Id.* (citation omitted) (emphasis in original). The Ninth Circuit also emphasized the *Russell* Court's reliance on "Congress' glaring omission of any mention of extra-contractual damages." *Id.* at 536. As the court concluded:

> [I]t must be noted that § 502(a)(3) also "says nothing about the recovery of extra-contractual damages," *Russell*, 105 S. Ct. at 3091, and emphasizes protection of the *plan*, not the direct protection of the beneficiaries. So viewed, the catch-all phrase of "other appropriate equitable relief" in § 502(a)(3) provides no more foundation for an award of emotional distress damages than does the same catchall [sic] phrase in § 409(a).

Id. (emphasis in original). If anything, section 502(a)(3) may provide even less support for an award of compensatory damages than does section 409(a) since only the latter provides for "other remedial relief" in addition to "appropriate equitable relief."

This court has relied on the reasoning of *Russell* in addressing the closely related question of punitive damages, holding that such damages are not an available remedy under section 502(a)(3) of ERISA. *Kleinhans v. Lisle Sav. Profit Sharing Trust*, 810 F.2d 618 (7th Cir. 1987). Like the Ninth Circuit, we placed particular emphasis on the *Russell* Court's observation regarding the "stark absence" of support for such a remedy in the statutory text and the legislative history of ERISA, and on the presumption

that such absence indicated that Congress had deliberately excluded the remedy from ERISA's comprehensive remedial scheme. *Id.* at 626. We also found that these observations were as relevant to section 502(a)(3) as to section 409(a). The reasoning we applied to *punitive* damages in *Kleinhans* leads us to conclude that extracontractual *compensatory* damages are equally unavailable under section 502(a)(3).

The plaintiffs, however, argue that the Sixth Circuit's decision in *Warren v. Society National Bank*, 905 F.2d 975 (6th Cir. 1990), supports their position that the damages they seek are recoverable as "other equitable relief" under section 502(a)(3). In *Warren*, the Sixth Circuit held that a plan beneficiary could recover damages under section 502(a)(3) for the increased tax liability he incurred as a result of the plan administrator's failure to carry out the beneficiary's instructions in transferring his share of the plan assets. The court found that *Russell* did not preclude recovery of these damages because the plaintiff's claim in *Warren* "differ[ed] from that of the plaintiff in *Russell* in two respects: (1) the nature of the alleged injuries and the relief sought, and (2) the statutory bases for the claim." *Id.* at 980.

According to the Sixth Circuit, Dr. Warren's claim differed from that of the plaintiff in *Russell* because in Dr. Warren's case the plan administrator "violated a contractual duty under the retirement plans to distribute his plan assets in accordance with his instructions." *Id.* The injuries Dr. Warren suffered were "direct injuries resulting from" that breach. *Id.* The *Russell* plaintiff, by contrast,

> made no claim that the fiduciary of her disability plan violated a contractual duty. In fact, the plaintiff had received all the benefits to which she was contractually entitled. Also, rather than seeking damages for direct injuries, the plaintiff sought punitive damages and damages for the consequential injuries of emotional distress and the necessity of cashing out her husband's retirement savings.

Id. Though well-intentioned, we do not find compelling the attempt to distinguish the injuries claimed by Dr. Warren from those alleged by the plaintiff in *Russell*. The *Russell* Court made no mention of the "directness" of the plaintiff's injuries in characterizing her claims as "extracontractual." Further, to the extent that one can draw a legitimate distinction between the two cases based on the "contractual duty" allegedly violated by the defendants in *Warren*, that distinction would appear to hurt rather than help the plaintiffs in the case at bar. As we have noted, the "contractual duty" alleged here existed in *Russell* as well, and presumably in every other case that has involved a violation of fiduciary duty. It would be difficult to treat this case differently based solely on the plaintiffs' artful framing of the issue.

More significant to the Sixth Circuit's decision were the different statutory bases of the two actions. The court correctly observed that because Dr. Warren had brought his action under section 502(a)(3) rather than section 409(a), *Russell* was not dispositive. The court went further, however, stating that "since the majority opinion in *Russell* did not deal with section 502(a)(3), questions arising under that section remain open." *Id.* at 981. Although literally correct, this observation ignores some of the broader implications of the *Russell* Court's reasoning. Rather than following those implications, the Sixth Circuit apparently relied heavily on the reasoning of Justice Brennan's concurring opinion in *Russell*. That separate opinion argued cogently that ERISA was intended to incorporate the law of trusts and therefore "a beneficiary is entitled to a remedy 'which will put him in the position in which he would have been if the trustee had not committed the breach of trust.' " *Russell*, 473 U.S. at 157 n.16 (Brennan, J., concurring in the judgment) (quoting Restatement (Second) of Trusts § 205, and Comment a (1959)). That remedy may include monetary damages. *Id.* at 154 n.10.

There is a good deal to be said for Justice Brennan's position on grounds of policy and, perhaps, of justice. But

it is not a position endorsed by the Supreme Court majority in *Russell*. As Justice Brennan observed in his concurrence:

> There is dicta in the Court's opinion . . . that could be construed as sweeping more broadly than the narrow ground of resolution set forth above. Although the Court takes care to limit the binding effect of its decision to the terms of § 409, its opinion at some points seems to speak generally of whether fiduciaries ever may be held personally liable to beneficiaries for extracontractual damages.

Russell, 473 U.S. at 150-61 (Brennan, J., concurring in the judgment). Although we might be sympathetic to the finding of a broader remedy in section 502, the *Russell dicta*, which commanded majority support in the Supreme Court and have generally carried the day in the courts of appeals, seem to require us to reject extracontractual remedies. While a broader remedial view might serve the ends of justice in the case before us, we do not think such a view is consistent with the reasoning of *Russell*.

The plaintiffs' final and perhaps most persuasive argument is that the Supreme Court adopted their position in the recent decision of *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990). The immediate issue in *Ingersoll-Rand* was not the availability of extracontractual damages under ERISA, but the scope of ERISA's preemption of state law claims. Perry McClendon claimed that Ingersoll-Rand had fired him in order to "avoid making contributions to his pension fund." *Id.* at 481. McClendon sued the company in Texas state court under various tort and contract theories, seeking compensatory and punitive damages. *Id.* The Supreme Court, in an opinion by Justice O'Connor, held that McClendon's causes of action under state law were preempted by ERISA. The basis of the plaintiffs' argument, however, is not the actual holding of *Ingersoll-Rand* but the final paragraph of the opinion, in which Justice O'Connor wrote:

> The preceding discussion also responds to the Texas court's attempt to distinguish this case as one not within ERISA's purview. . . . [T]here is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek "pension benefits." It is clear that the relief requested here is well within the power of federal courts to provide. Consequently, it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits.

Id. at 486. Based on this surprising language, the plaintiffs argue with considerable plausibility that *Ingersoll-Rand* supports their claims for extracontractual damages, including punitive damages, under ERISA.

Some courts have indeed read *Ingersoll-Rand* as overruling *Russell* and its progeny. In *Blue Cross and Blue Shield v. Lewis*, 753 F. Supp. 345 (N.D. Ala. 1990), the Northern District of Alabama stated: "According to *Ingersoll-Rand*, a court, state or federal, in an ERISA case, may, as an ERISA remedy, award extra-contractual, even punitive, damages, that is, if the facts call for such a remedy." *Id.* at 347. *See also International Union, United Automobile, Aerospace and Agricultural Implement Workers v. Midland Steel Products Co.*, 771 F. Supp. 860, 863 (N.D. Ohio 1991) ("The Supreme Court's holding in *Ingersoll-Rand v. McClendon* . . . conclusively establishes the availability of legal remedies under ERISA."); *Haywood v. Russell Corp.*, 584 So.2d 1291, 1297 (Ala. 1991) ("The Supreme Court, in *Ingersoll-Rand*, has now specifically held that the courts are authorized to award damages, both extracontractual, and even punitive, where the facts support them, even though they are not specifically provided for in ERISA.").

Other courts disagree. In *O'Neil v. Gencorp, Inc.*, 764 F. Supp. 833 (S.D.N.Y. 1991), the Southern District of New York granted GenCorp's motion to dismiss the plaintiffs' claim for punitive damages on the ground that punitive damages are unavailable as a remedy for breach of fiduciary duty under ERISA. Rejecting the plaintiffs' ar-

gument that *Ingersoll-Rand* supported their claim for punitive damages, the Southern District observed:

> Had Justice O'Connor intended, as plaintiffs claim, that [her] analysis of § 510 was overruling the considerable amount of federal caselaw barring punitive and extracontractual damages under ERISA (particularly the cases which specify that punitive damages are unavailable under § 510), she undoubtedly would have so stated.
>
> Furthermore, since Justice O'Connor's *dicta* in *Ingersoll-Rand* discusses remedies under § 502(a) generally and are not limited to § 502(a)(3), one would also expect an explanation of the effect on *Russell*'s holding that punitive damages are unavailable under § 502(a)(2), as well as a distinction from *Russell*'s elaborate rationale for generally excluding punitive damages in ERISA actions.

Id. at 834. *See also Gaskell v. Harvard Coop. Society*, 762 F. Supp. 1539, 1544 (D. Mass. 1991) ("[H]ad the Supreme Court intended to expand the realm of potential relief available under ERISA, . . . it would have done so explicitly. Such a departure from precedent likely would not have been accomplished in a single sentence, in dicta, at the close of an opinion focused exclusively on a wholly different issue."); *Monfiletto v. John Hancock Healthplans, Inc.*, Civ. No. 90-5137, 1991 U.S. Dist LEXIS 15875, at *5 (E.D. Pa. Oct. 30, 1991). The Eleventh Circuit, in holding that extracontractual damages are not available under section 502(a)(3), explicitly found that such a holding did not conflict with *Ingersoll-Rand*. *See McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991). Judge John Minor Wisdom, sitting by designation, explained the *Ingersoll-Rand* dicta as follows:

> The Supreme Court was stating that federal law provides relief for ERISA actions other than those that seek to recover pension benefits, such as the plaintiff's cause of action for wrongful termination. The

> Supreme Court is not holding that the specific *remedies* this plaintiff had sought under state law are necessarily the remedies that will be afforded him should he be granted *relief* under ERISA § 502.

Id. at 821.

Although we do not necessarily subscribe to this or any other explanation of what the Supreme Court might have meant by the *Ingersoll-Rand* dicta, we are not rash enough to believe that the Court intended to overrule settled law in most of the circuits, as well as narrowly limit—if not overrule—its own decision in *Russell* in such an off-hand manner. Of course, we do have a "plain meaning" argument to contend with. And it is possible that Justice O'Connor *did* intend to limit *Russell* severely. Nevertheless, we think the prudent course is to follow Judge Wisdom in his interpretation. We will continue to doubt the availability of extracontractual damages under ERISA until a more plausible signal reaches us from above.

B. *Punitive Damages*

Although the district court allowed the plaintiffs' compensatory damage claims to be tried, it dismissed their claims for punitive damages on the ground that such damages are not available in an action by a beneficiary under either section 502(a)(1)(B) or section 502(a)(3) of ERISA. The plaintiffs have cross-appealed that ruling.

1. Section 502(a)(1)(B)

In dismissing the plaintiffs' claims for punitive damages under section 502(a)(1)(B), the district court explicitly relied on the Supreme Court's decision in *Russell*. As noted, the Court held in *Russell* that extracontractual compensatory and punitive damages are not available in an action for breach of fiduciary duty brought by a beneficiary to redress a violation of section 409(a) of ERISA. Based on the Court's reasoning in that case, we have held that extracontractual compensatory damages are also not

recoverable under section 502(a)(1)(B). The same reasoning supports the district court's conclusion that punitive damages are similarly unavailable under section 502(a)(1)(B). The *Russell* Court treats compensatory and punitive damages together, under the rubric of "extracontractual damages." Therefore, if *Russell* means that beneficiaries cannot recover extracontractual compensatory damages under section 502(a)(1)(B), then punitive damages must be unavailable as well.

2. Section 502(a)(3)

This court has already held that punitive damages are not recoverable under section 502(a)(3). *See Kleinhans v. Lisle Savings Profit Sharing Trust*, 810 F.2d 618, 627 (7th Cir. 1987). This holding is consistent with that of every other circuit that has addressed the issue. *See Amos v. Blue Cross-Blue Shield*, 868 F.2d 430 (11th Cir.), *cert. denied*, 110 S. Ct. 158 (1989); *Pane v. RCA Corp.*, 868 F.2d 631, 635 n.2 (3d Cir. 1989); *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821 (1st Cir. 1988); *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986); *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986); *Powell v. Chesapeake & Potomac Tel. Co.*, 780 F.2d 419 (4th Cir. 1985).[5]

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[5] The Supreme Court's decision in *Ingersoll-Rand* does not change the result under either section 502(a)(1)(B) or section 502(a)(3). The "relief requested" in *Ingersoll-Rand*, which Justice O'Connor states is "within the power of the federal courts to provide," does include punitive damages. However, the argument against construing these dicta to mean that such damages may be recovered under ERISA is even stronger in the context of punitive damages than in that of compensatory damages; there is more circuit court precedent directly addressing the issue of punitive damages, and that precedent uniformly holds that such damages are not available under ERISA. Thus, it would be even more rash to conclude that the Court overruled all of this precedent without so much as a footnote reference to it, although again "plain meaning" may cut the other way.

III

In addition to their primary claims regarding the availability of compensatory and punitive damages under ERISA, the parties allege error in the district court's rulings on a number of other issues. Specifically, the defendants appeal the court's rulings that the plaintiffs had a right to a jury trial on their claim for compensatory damages and that Kuehl's increased tax liability may have resulted from the defendants' unjustified delay in distributing his benefits. The defendants also argue that the trial court erred in refusing to impose sanctions on the plaintiffs under Fed. R. Civ. P. 11. The plaintiffs cross-appeal the district court's refusal to impose on the defendants statutory penalties provided by ERISA for failure to produce Plan documents upon request. Both parties challenge the court's calculation of the attorney's fees awarded to the plaintiffs.

We need not address the defendants' claims regarding jury trial and Kuehl's damages because they have been mooted by our holding in Part II that the plaintiffs' compensatory damages are not recoverable under ERISA. We discuss each of the other claims in turn.

A. *Rule 11 Sanctions*

The district court rejected the defendants' request for sanctions based on five motions filed by the plaintiffs during the first six months of the litigation, all of which were denied by the court. The district court found that, "[g]iven the heightened animosity and accompanying zeal marking this litigation, sanctions appear unwarranted." Order at 1-2 (Aug. 2, 1990). We review the district court's ruling on Rule 11 sanctions for "abuse of discretion." *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 930 (7th Cir. 1989) (en banc). This standard applies "whether sanctions were imposed or not." *Id.* The defendants have not shown that the district court abused its discretion by refusing to impose sanctions in this case. This court has stated that Rule 11 "is a law imposing sanctions if counsel files with improper motives or inadequate investigation."

Id. at 932. The defendants have failed to establish that either of these factors was present here. The fact that the court denied several pre-trial motions filed by the plaintiffs does not necessarily import a violation of Rule 11. As we have observed, "Rule 11 focuses on . . . conduct rather than result." *Id.* Although the district court noted that the plaintiffs' counsel had taken an "unyielding approach to discovery" at the outset of the litigation, Order at 3 (May 11, 1988), the court did not characterize any of the plaintiffs' motions as "frivolous." Nor did the judge find that any of them had been filed with "improper motives." The defendants do not point to any evidence in the record that compels either of these conclusions. We affirm the district court's denial of Rule 11 sanctions.

B. *Statutory Penalties*

The plaintiffs asked the district court to impose statutory penalties on the defendants as a sanction for the defendants' refusal to comply with the plaintiffs' repeated requests for information about the Plan. The district court denied the plaintiffs' request, ruling that "[a]ny damage or prejudice suffered by the plaintiffs as a result of the defendants' failure to freely provide information . . . is directly reflected in the tardy payment of benefits," for which the plaintiffs would receive compensatory damages. Order at 2 (Aug. 2, 1990). Thus, the court concluded, it was "unnecessary to consider imposing statutory penalties." *Id.* The plaintiffs contend that the district court's ruling is incorrect as a matter of law because the court focused on the question of actual prejudice or damage in denying penalties. We reject this argument.

Section 502(c) of ERISA clearly commits the determination whether or not to impose statutory penalties to the discretion of the district court. The statute provides:

> Any administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to

> a participant or beneficiary . . . *may in the court's discretion* be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal . . .

29 U.S.C. § 1132(c)(1)(B) (1988) (emphasis supplied). The plaintiffs, however, argue that under our decision in *Ziaee v. Vest*, 916 F.2d 1204 (7th Cir. 1990), a district court abuses its discretion when it denies a request for penalties based on the injury suffered by the plaintiffs as a result of the defendants' violation. The plaintiffs' reliance on *Ziaee* is misplaced. In that case we reversed and remanded a district court judgment granting substantial statutory penalties on the ground that the court had not made sufficient findings to support the award. In the course of doing so, however, we rejected the defendants' claim that *no award* was permitted because the plaintiffs had not demonstrated injury from the delay. Rather, we said, "[t]he statute commits the size of the penalty to the district judge's discretion; the judge may, but need not, consider the provable injury when exercising that discretion." *Id.* at 1210. This statement is permissive rather than restrictive; the fact that the district court may award statutory penalties even when there is no provable injury by no means suggests that the court may not *deny* penalties when there *is* injury. Contrary to the plaintiffs' argument, *Ziaee* reinforces rather than constricts the district court's discretion in this area.

In the case before us, however, the district court based its decision to deny statutory penalties on a fact that no longer obtains because of our reversal of the judgment as to compensatory damages. Therefore, we vacate the court's judgment denying statutory penalties and remand for further proceedings consistent with this opinion.

C. *Attorney's Fees*

The plaintiffs sought attorney's fees in the amount of $146,000 under section 502(g)(1) of ERISA. Section 502(g)(1) provides:

> In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

29 U.S.C. § 1132(g)(1) (1988). The district court granted the plaintiffs' request for fees, but awarded only $47,729.81 because it found the plaintiffs' billing records inadequate to allow the court to "exclude hours not 'reasonably expended.' " Order at 8 (Aug. 2, 1990). Therefore, the court decided to "determine the fee equitably," by treating the case "as one pursued on a contingent fee basis," and awarded the plaintiffs attorney's fees in an amount approximately one-third of their total recovery. *Id.* at 9. The plaintiffs argue that the district court's reduction of their attorney's fees constitutes an abuse of discretion. The defendants argue that the plaintiffs should receive far less than they were awarded by the district court because their action for compensatory damages was not one brought "under this subchapter" of ERISA. We address the defendants' contention first.

We agree with the defendants that the plaintiffs should not be able to recover attorney's fees for that portion of the litigation that dealt with compensatory damages. In light of our analysis above, an action for compensatory damages resulting from a plan fiduciary's breach of fiduciary duty is not an "action under this subchapter [Title I]" of ERISA. The fact that this circuit had not previously resolved that issue does not change this result. The defendants should not have to bear a greater burden than the plaintiffs because of that uncertainty. On remand, then, the district court may award the plaintiffs only those fees reasonably attributable to claims that may be brought under ERISA: that is, claims for benefits due, statutory penalties and the like.

The question remains, however, whether the district court on remand may use the same method to calculate the fee award that it did the first time around. We conclude that the district court's approach, though somewhat

unorthodox, did not constitute an abuse of discretion. Nevertheless, we consider the lodestar method to be more appropriate in a case such as this one, and recommend that the court employ that approach on remand.

In *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986), we held that under appropriate circumstances a court could use contingent fees as a "benchmark" in making an award of attorney's fees under 42 U.S.C. § 1988. Judge Easterbrook, writing for the court, explained that:

> A court's objective is to find the rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." [citation omitted] When the "prevailing" method of compensating lawyers for "similar services" is the contingent fee, then the contingent fee *is* the "market rate."

Id. at 324. We think that, in certain cases, this reasoning may be equally applicable to the award of fees under ERISA. Both section 1988 and ERISA require the district court to determine a "reasonable" attorney's fee. We see no reason to conclude that using the "market rate" for services as a guideline is appropriate under section 1988 but not under the perhaps less plaintiff-oriented ERISA fee-shifting provision. *Cf. Bandura v. Orkin Exterminating Co.*, 865 F.2d 816, 822 (7th Cir. 1988) (upholding district court's application of *Kirchoff* "market rate" rule in determining a "reasonable attorneys' fee" under Illinois Consumer Fraud and Deceptive Practices Act). Therefore, if the plaintiffs' claims are of the type that in the private market would be the subject of a contingency agreement, the district court did not abuse its discretion in relying on a contingent fee standard in determining the appropriate attorney's fees.

Nevertheless, we recommend that the district court employ the lodestar method on remand if at all feasible. As the *Kirchoff* court noted: "[T]he use of contingent fees is appropriate in cases that enforce old precedents and allow effective compensation as a percentage of the total

recovery," while "the lodestar approach is best in cases with substantial injunctive or precedent-creating components." 786 F.2d at 328. This case would seem to fall within the latter category.

IV

For the foregoing reasons, we REVERSE the judgment awarding the plaintiffs compensatory damages and AFFIRM the dismissal of the plaintiffs' claims for punitive damages. We also AFFIRM the denial of sanctions under Fed. R. Civ. P. 11. We VACATE the denial of statutory penalties and the award of attorney fees and REMAND those issues for further proceedings consistent with this opinion.

FLAUM, J., concurring. Although I agree with the judgment of the court, unlike the majority I am neither "reluctant" nor "dubious," *see ante* at 8, 10, in determining that extra-contractual damages are not available under either section 502(a)(1)(B) or section 502(a)(3) of ERISA. Supreme Court precedent and statutory interpretation, as well as the great majority of other circuits which have considered the issue, all point in the direction of excluding such damages. I would therefore find that extra-contractual damages are excluded without second-guessing the wisdom of policy determinations already made by Congress.

Part IIA contains numerous references to the "troubling" implications of excluding extra-contractual damages. It notes, for example, that "on grounds of policy and, perhaps, of justice," a good deal can be said for allowing extra-contractual damages under section 502. *Ante* at 14. In the abstract, that may be so. But ERISA, like all legislation, is the result of compromise and policy decisions. One of those decisions, as the Ninth Circuit observed in *Sokol v. Bernstein*, 803 F.2d 532, 537 (9th Cir. 1986), was the determination "that the entire statute was aimed at the protection of the integrity of pension plans, rather than at direct protection of beneficiaries." The majority advances views as to the advisability of Congress's policy choice. In this context, I do not consider it appropriate or necessary to speculate on the merit of these congressional determinations. Regardless of whether we are "sympathetic" to allowing plaintiffs to recover extra-contractual damages in ERISA actions, *ante* at 15, given the relevant legislative history, statutory interpretation, and case law, they should be excluded.

Unlike the majority, I do not find the Sixth Circuit's attempt in *Warren* to distinguish *Massachusetts Life Insurance Company v. Russell*, 473 U.S. 134, 147 (1985), to be "well-intentioned." *Ante* at 14. Indeed, I find it somewhat disturbing that the court did not choose to follow the reasoning of the majority opinion in *Russell* "as setting a proper guide to follow rather than Justice Brennan's separate opinion which speaks for a minority of the

Court." *Warren v. Society Nat'l Bank*, 905 F.2d 975, 984 (Wellford, J., dissenting). Such an approach merely "tampers with an enforcement scheme" crafted with evident care by ERISA's drafters. *See Russell*, 473 U.S. at 147. I would adhere to the Supreme Court's admonitions that "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Id.* (citations omitted).

Neither do I find persuasive the plaintiffs' argument that a single sentence of dicta authored by Justice O'Connor in *Ingersoll-Rand Company v. McClendon*, 111 S. Ct. 478 (1990), authorizes extra-contractual damages as a remedy under ERISA. I agree with those courts that find that "[s]uch a departure from precedent likely would not have been accomplished in a single sentence, in *dicta*, at the close of an opinion focused exclusively on a wholly different issue." *Gaskell v. Harvard Co-operative Soc'y*, 762 F. Supp. 1539, 1544 (D. Mass. 1991) (emphasis in original). Indeed, given that Russell has been a cornerstone of the ever-growing jurisprudence barring extra-contractual damages under ERISA, it seems to me highly unlikely that the Supreme Court would reverse its course without so much as an attempt to distinguish or explain *Russell*. If the Court is intending to modify the state of the law in this area, it is doing so in a surprisingly murky manner.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 87-C-1345

KATHLEEN A. BASSLER HARSCH,
DOUGLAS M. BIHLER,
THOMAS D. KUEHL,
PAULA C. MILLER, and
LISA P. TALLAR,

Plaintiffs,

vs.

ALAN D. EISENBERG, Individually
and as Trustee and Administrator
of the Alan D. Eisenberg, S.C. Pension
and Profit Sharing Plan, and as President
and Sole Director of Alan D. Eisenberg, S.C.
THE ALAN D. EISENBERG, S.C. PENSION
AND PROFIT SHARING PLAN, and
ALAN D. EISENBERG, S.C.,
a Wisconsin corporation,

Defendants.

Aug. 2, 1990
Order and Decision of District Court

Cook & Franke, S.C., for Petitioners.

O'Neill, Cannon & Hollman, S.C., for Respondents.

J.P. STADTMUELLER, U.S. DISTRICT JUDGE

Following trial of the above-captioned matter, the jury returned a verdict for plaintiffs. The jury awarded $7,500

in compensatory damages to each of four plaintiffs, and $25,000 to plaintiff Thomas Kuehl. In addition, the jury found against defendants on their counterclaim against Kuehl. The matter is now before the court on defendants' motions following the verdict. Plaintiffs' motion for attorneys' fees and costs, as well as defendants' motions for sanctions, will be the subject of a separate decision.

I. DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Defendants move for judgment notwithstanding the verdict, arguing that the verdict is excessive and that plaintiffs are not entitled to claim extra-contractual damages as a matter of law.

The Court has already rejected defendants' argument that compensatory damages are not available under ERISA, and circumstances do not warrant revisiting the question at this juncture. Instead, the court will focus on the argument that the verdict was excessive.

The standard for deciding a judgment notwithstanding the verdict motion was set forth succinctly by Judge Gordon in *Cornelius v. La Croix*, 631 F. Supp. 610 (E.D. Wis. 1986):

> [T]he court must consider whether the evidence presented, combined with all reasonable inferences that can be drawn from it, is sufficient to support the verdict when viewed in the light most favorable to the prevailing party. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 153 (7th Cir. 1981). A court may not judge the credibility of the witnesses or reweigh the evidence to find a preponderance on one side or the other. *La Montagne v. American Convenience Product, Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984). The court, however, will consider whether the evidence

> to support the verdict is substantial: "a mere scintilla of evidence will not suffice." *Id.*

Id. at 615-16.

Defendants argue that, at most, a higher rate of interest than that which plaintiffs earned under the plan could be assessed for the period during which they awaited distribution. Accordingly, defendants ask that judgment notwithstanding the verdict be granted, striking or reducing the award. Because the jury award exceeds the amount payable for any such additional interest, defendants contend, it is excessive and represents improper recovery for punitive and extra-contractual damages. Defendants do not discuss the evidence relating to damages in support of their judgment notwithstanding the verdict motion. While the amount of damages might be considered on a motion for judgment notwithstanding the verdict, such a motion focuses most clearly on liability issues.

Instead, defendants appear to argue that if compensatory damages are available as a matter of law, then a new trial or remittitur must be granted because there is no rational connection between the evidence and the verdict. This question is governed by a broad standard:

> "The authority to grant a new trial . . . rests almost completely within the trial court's discretion. A new trial is warranted to prevent a miscarriage of justice if the district court determines that the jury verdict is contrary to the clear weight of the evidence, the damages are excessive, or, for any other reason, the trial was not fair to the moving party. A new trial is not justified merely because the jury could have reached a different result.

Cornelius, 631 F. Supp. at 616 (citations omitted).

The jury in this case was presented with conflicting, and even confusing, evidence. It is noteworthy at the outset

that, though plaintiffs' individual circumstances varied, $7,500 in compensatory damages was awarded each plaintiff except Thomas Kuehl, who was awarded $25,000.

Plaintiffs contend that certain evidence common to all plaintiffs fully supports the damage award. In particular, plaintiffs contend they were humiliated and insulted by defendants after leaving Eisenberg's employ and seeking disbursement of benefits. However, while plaintiffs' testimony at trial reflected vexation and frustration, it generally fell short of clearly demonstrating any actual damages, much less damages in the amounts awarded. Like the parties, the court will consider separately the evidence relating to each plaintiff's damages.

Paula Miller

Paula Miller's distribution under the plan was $5,264.55. Miller testified that if paid earlier she would have used the money to pay off her credit card balance, which was accruing 18 percent interest. The plan paid 4 percent interest on Miller's money. Defendants contend that Miller's maximum loss was an annual interest expense of approximately 14 percent on 90 percent of her plan balance over the 15 month period, of delay claimed by Miller, resulting in damages of approximately $709.00.

Plaintiffs do not dispute this calculation. They do point out that Miller used a portion of her distribution to buy a house, arguing that the jury could have concluded that Miller would have purchased a home earlier with timely distribution. However, plaintiffs do not point to any evidence that Miller would have purchased a home sooner under different circumstances, or that she suffered any actual loss in not having the money available sooner to apply toward a house purchase. Accordingly, Miller's damages are remitted to $709.00.

Kathaleen A. Bassler Harsch

Kathaleen Bassler Harsch offered no evidence of actual loss resulting from a delay in her distribution of $1,133.19. Since she placed the money into her checking account, it is not clear she would have received any interest on it. Plaintiffs merely argue that the jury could conclude she would have been able to use her distribution earlier if it had been distributed on time. This assertion may be true as a general proposition. But the evidence suggests no use of the money that rationally translates to a roughly measurable loss (much less a loss of $7,500) due to a delay in receiving the distribution. Since plaintiffs do not dispute that the money was earning some interest prior to distribution, Bassler Harsch's damages are remitted to a nominal $1.00.

Douglas M. Bihler

After ceasing employment with Eisenberg's firm, Bihler established his own law practice. He claimed that because of the delay in payment of $5,354.69 due him under the plan, he was unable to afford a secretary for approximately four months. As a result, he spent time doing nonbillable secretarial work that could otherwise have been spent doing billable legal work. Defendants contend that Bihler claimed damages of approximately $4,800.00: plaintiffs suggest that this amount was offered in closing argument as a conservative estimate, but that the actual loss could have exceeded $10,000 at Bihler's billing rate. Further plaintiffs argue that Bihler would have had other uses for the money, including modernizing his offices and increasing its efficiency. Since he actually received the money after his law practice was through the start-up phase, he and his wife used the funds to buy a house.

It is not clear that the delay in payment caused Bihler to suffer any actual loss in delaying a house purchase or making expenditures for his law practice. Moreover, the amount awarded by the jury bears no recognizable relation to the damages claimed, particularly in light of the fact that he was awarded a sum identical to the other plaintiffs whose benefits and personal circumstances significantly differed. In light of these considerations, the court will order a remittitur to plaintiffs' assertedly "conservative" estimate of $4,800.00.

Lisa P. Tallar Kuehl

Lisa Tallar Kuehl claims that delay in payment caused her distribution to be subject to relatively unfavorable provisions of the Tax Reform Act of 1986. Her resultant alleged loss was $3,110.00. The evidence does not support any additional damage amount.

The parties dispute evidence concerning expert testimony. They also dispute tax effects as an element of compensatory damages. The Court will not enter into this debate; defendants did not raise this issue in requesting jury instructions, though it clearly was central to plaintiffs' damages case.

Thomas D. Kuehl

Thomas Kuehl's distribution under the plan was $87,974.00. The jury awarded Kuehl $25,000.00. Like Tallar-Kuehl, he claims that late distribution deprived him of the benefit of relatively favorable tax laws, resulting in increased tax liability. His net claimed loss was $27,892.00.

Again defendants argue that tax consequences are an improper damage consideration. Defendants also argue

that Kuehl was not actually entitled to distribution prior to the effective date of tax law changes in question. They contend that Kuehl could have avoided any detrimental tax effects by rolling over the funds into an IRA account. Plaintiffs point out that because part of the tardy distribution was in the form of loan forgiveness, he did not receive all the money as cash that he could place in an IRA.

The jury heard conflicting evidence on most of the issues. Moreover, the jury heard expert testimony that Kuehl's damages exceeded those actually awarded. The Court will not order remittitur as to this amount. However, while plaintiffs' circumstances and vested benefits varied, there is also much similarity concerning measurement and proof of damages. On the whole, it is impossible to reconstruct the jury's calculations of any of the damage awards. Circumstances strongly suggest a lack of rational connection between the awards and the evidence as to some or all plaintiffs. The jury was clearly instructed not to award punitive damages or attorneys' fees and costs, but the obvious disparity suggests they may have made such an award. To the extent the court is able to discern a reasonable adjustment of the amounts awarded, plaintiffs Paula Miller, Kathaleen Bassler Harsch, Douglas Bihler and Lisa Tallar Kuehl will be offered a choice between remittitur to the maximum amount the court finds a reasonable jury could have awarded and a new trial on damages issues.

Two minor matters are worthy of note concerning the damage awards. Defendants contend that plaintiffs failed to plead the special circumstances underlying their damage claims in violation of Fed. R. Civ. P. 9(g). However, the complaint pleaded facts supporting the damage claims with sufficient specificity to inform the defendants of the claimed nature and extent of damages, and to enable defendants to adequately respond.

Defendants also contend that plaintiffs, in closing argument, improperly invited the jury to make a speculative or punitive damage award by asking the jury to "send the defendants a message." There is no reason to think actual prejudice was caused by the closing remarks of plaintiffs' counsel. The court carefully instructed the jury against both speculation and awarding punitive damages. The irrational consistency of four out of five awards, defendants' chief evidence that the closing argument was prejudicial, may have had other causes, such as plain confusion.

The Counterclaim

Defendants also seek a new trial on their counterclaim, pursuant to Fed. R. Civ. P. 59(a), contending the jury's finding that Thomas Kuehl was not a fiduciary is against the clear weight of the evidence.

On this issue, too, the jury faced conflicting evidence. Documents and testimony at trial indicate that Kuehl was at least a nominal contact for plan accountants and attorneys. However, the jury was forced to weigh the credibility of conflicting evidence as to whether Kuehl actually had discretionary authority over the plan. The court will not disturb the jury's conclusion on this issue.

Therefore,

IT IS ORDERED that defendants' motion for judgment notwithstanding the verdict be and the same is hereby DENIED; and

IT IS FURTHER ORDERED that defendants' motion for a new trial on defendants' counterclaim be and the same is hereby DENIED; and

IT IS FURTHER ORDERED that defendants' motion for a new trial on the issue of damages be and the same is hereby DENIED on the condition that plaintiffs accept a remittitur of compensatory damages awarded to Paula L. [sic] Miller in excess of $709.00; to Kathaleen Bassler-Harsch in excess of $1.00; to Douglas M. Bihler in excess of $4,800.00; and to Lisa P. Tallar-Kuehl in excess of $3,110.00; and,

IT IS FURTHER ORDERED that in the event the affected plaintiffs do not accept, serve and file the remittitur within thirty (30) days from the date of this order, the case will be placed on the court's calendar for a scheduling conference.

Dated at Milwaukee, Wisconsin this 2nd day of August, 1990.

BY THE COURT:

/s/ J.P. STADTMUELLER
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 87-C-1345

KATHLEEN A. BASSLER HARSCH,
DOUGLAS M. BIHLER,
THOMAS D. KUEHL,
PAULA C. MILLER, and
LISA P. TALLAR,

Plaintiffs,

vs.

ALAN D. EISENBERG, Individually
and as Trustee and Administrator
of the Alan D. Eisenberg, S.C. Pension
and Profit Sharing Plan, and as President
and Sole Director of Alan D. Eisenberg, S.C.
THE ALAN D. EISENBERG, S.C. PENSION
AND PROFIT SHARING PLAN, and
ALAN D. EISENBERG, S.C.,
a Wisconsin service corporation,

Defendants.

Jan. 23, 1989

Trial Court's Ruling Regarding Punitive
Damages and Jury Trial

Cook & Franke, S.C., for Petitioners.

O'Neill, Cannon & Hollman, S.C., for Respondents.

J.P. STADTMUELLER, U.S. DISTRICT JUDGE

Defendants in this case filed a motion to strike plaintiffs' claim for punitive damages and demand for a jury trial, pursuant to Fed. R. Civ. P. 12(f). Turning first to the issue of punitive damages, I will consider each relevant provision of the Employee Retirement Income Security Act of 1974 seriatim. (ERISA) The provisions allowing beneficiaries to bring actions appear in Section 503 of the act, and are codified at 29 U.S.C. Section 1132(a)(1), (2) and (3) as follows:

> A civil action may be brought—
> (1) by a participant or beneficiary—
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

In *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134, 144 (1985), the Supreme Court ruled that punitive damages are not available to beneficiaries under Section 1132(a)(2). Remedies under that provision are available only to the plan as a whole. *Id.* at 140-42. Plaintiffs make the present claim as individuals. Even if their complaint could be construed otherwise, Section 1132(a)(2) does not allow punitive damages. *Kleinhans v. Lisle Savings Profit Sharing Trust, et al.*, 810 F.2d 618, 626 (7th Cir. 1987) (citing *Russell, supra*, 473 U.S. 134. Individual remedies are available under Section 1132(a)(1)(B), as specified in that provision. But these remedies

do not include punitive damages. *See Russell, supra*, 473 U.S. at 144. Similarly, possible relief under Section 1132(a)(1)(A) is not in the form of punitive damages.

Punitive damages are also not recoverable under Section 1132(a)(3). The Seventh Circuit specifically addressed this provision in *Kleinhans, supra*, 810 F.2d 618. Finding that the trial court properly denied the plaintiff's motion to amend his complaint to state a claim for punitive damages, the *Kleinhans* court held that such an amendment "would be fruitless since punitive damages are not available under ERISA." *Id.* at 627. Nothing in either 29 U.S.C. Section 1001, declaring ERISA policy, or 29 U.S.C. Section 1104, delineating fiduciary duties, alters this conclusion.

In various submissions to this court plaintiffs assert bad faith on the part of defendants. Any bad faith claims in this matter do not arise under the terms of ERISA, but under state law. ERISA Section 514(a), 20 U.S.C. Section 1144(a), the "pre-emption clause", provides that ERISA supersedes all state laws insofar as they "relate to any employee benefit plan" as described in the act. The "savings clause", ERISA Section 514(b)(2)(A), 29 U.S.C. Section 1144(A) excepts from pre-emption any state law that regulates insurance. And ERISA Section 514(b)(2)(B), 29 U.S.C. Section 1144(b)(2)(B), the "deemer clause," states that no employee benefit plan is an insurer for purposes of any state law purporting to regulate insurance. Since nothing in this case suggests that the Wisconsin law of bad faith is a law regulating insurance, this court need not consider the allegations of bad faith in deciding the issues at hand. *Cf. Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549 (1987) (Mississippi law of bad faith found not to be a law regulating insurance).

Turning to the question of plaintiffs' entitlement to a jury trial, it is necessary first to consider whether a jury trial is provided by the statute's terms. *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 1835 n.3 (1987) (citations omitted). However, the Seventh Circuit has concluded that ERISA provides no right to a jury trial, finding "that Congress' silence on the jury right issue reflects an intention that suits for pension benefits by disappointed applicants are equitable," *Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d 820, 829 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981). *See Brown v. Retirement Committee of the Briggs and Stratton Retirement Plan*, 797 F.2d 521, 527 (7th Cir. 1987) (quoting *Wardle v. Central States*, 627 F.2d at 829), *cert. denied*, 479 U.S. 1094 (1987).

Though the statute itself does not, by its terms or intent, provide for a jury trial, the seventh amendment may provide a jury trial by right. The Supreme Court has construed the seventh amendment to require a jury trial in actions analogous to "suits at common law." *Tull v. United States*, 107 S.Ct. at 1835 (1987). "To determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity or admiralty, the court must examine both the nature of the action and of the remedy sought." *Id.* In finding no statutory right to a jury trial under ERISA, the *Wardle* court fundamentally gave the requisite consideration to common law, basing its conclusion "primarily on the law of trusts, which provides a beneficiary with a legal remedy only with respect to money the trustee is under a duty to pay unconditionally and immediately to the beneficiary. *Restatement (Second) of Trusts* Sections 197-198 (1959)." *Wardle v. Central States*, 627 F.2d at 829.

Plaintiffs' entitlement to a jury trial in the case before this court turns on whether plaintiffs' claim "money the trustee is under a duty to pay unconditionally and immediately." The common law cause of action for funds due unconditionally and immediately was the action of account, later superseded by a bill in equity and by the legal actions of debt and general assumpsit. *Restatement (Second) of Trust* Section 198 comment b (1959). *See* A. Scott and W. Fratcher, 3 *The Law of Trusts*, Section 198.1 (4th ed. 1988). The question, then, becomes whether at common law an action of account would lie in this case. Plaintiffs' complaint and their briefs on this motion indicate that plaintiffs' claim is essentially for unpaid vested benefits and compensatory damages arising from defendants' alleged failure to timely pay benefits. Reduced to its essence, plaintiffs' claim is for benefits owed.

Some authority suggests that a common law action for accounting could not be brought unless "the trust [had] been closed and settled and the balance ascertained." *Van Camp v. Orleans County National Bank*, 147 N.Y. 50, 41 N.E. 427, 430 (1895); *see Hoffman v. Nagler, et al.*, 206 Misc. 623, 134 N.Y.S.2d 335 (1954). An action to enforce a continuing trust was equitable. But "if there [had] been an accounting and promise to pay, or the equivalent thereof, an action at law [could] be brought for the ascertained sum." *Batchis v. Leask, et al.*, 149 App. Div. 713, 134 N.Y.S. 350, 352 (1912). However, denying any obligation was ever incurred might also allow an action of account to go forward. *See* Belsheim, "The Old Action of Account," 45 *Harv. L.Rev.* 466, 495 (1932) (citing cases).

In the present case, defendants have effectively rendered account, and the trust is closed as to plaintiffs. Defendants have recognized an obligation, having paid benefits to plaintiffs apparently in response to this litiga-

tion. Based on these facts and the foregoing considerations, plaintiffs are entitled to a jury trial on the issue of compensatory damages. *Cf. Ovitz v. Jeffries Co. Inc., et al.*, 553 F.Supp. 3001 (1982) (Ovitz entitled to jury trial because his ERISA claims for interest on his profit sharing account and for pro rata share of his former employer's contribution to the profit sharing plan were predicated on defendants' alleged contribution to pay amounts "unconditionally and immediately").

Without belaboring the point, the conclusion reached here might be different if plaintiffs' eligibility for any benefits under the plan was in issue. *Cf. Wardle v. Central States*, 627 F.2d 820, 829 n.19 (1980) (court expresses opinion that, even if Wardle were entitled to retirement benefits, he would not be entitled to immediate and unconditional payment, though facts indicate that retirement date was February 28, 1975 and litigation was not initiated until after final denial of benefits in 1976).

Plaintiffs' jury trial right arises solely under 29 U.S.C. Section 1132(a)(1)(B). Other ERISA provisions providing for civil enforcement appear inapplicable (see above discussion of 29 U.S.C. Section 1132(a)(2)) or do not afford a right to jury trial. *See, e.g, Cox v. Keystone Carbon Co.*, 861 F.2d 390 (3d Cir. 1988).

Therefore,

IT IS ORDERED that plaintiffs' demand for a jury trial be and the same is hereby GRANTED; and

IT IS FURTHER ORDERED that plaintiffs' claim for punitive damages be and the same is hereby DENIED.

BY THE COURT:

/s/ J. P. STADTMUELLER
U.S. DISTRICT JUDGE

SUMMARY OF LOSSES RESULTING FROM DELAYED DISTRIBUTIONS

	THOMAS KUEHL		LISA TALLAR KUEHL	
	1986 (Hypothetical)	1988 (Actual)	1986 (Hypothetical)	1988 (Actual)
Total Benefit Distribution	81,216	87,974	9,167	9,843
Less Loan Payment	-45,263	-51,955	-1,240	-1,350
Net to Employee Before Taxes	35,953	35,992	7,927	8,493
Tax Impact	(13,370)	(40,739)	(961)	(4,559)
Net (loss) to employee after taxes	22,583	(4,747)	6,966	3,934
Interest to 1988	+ 948		+ 272	
	23,531		7,238	
	23,531		7,238	
	+ 4,747		-3,934	
Difference due to 1988 Distribution	28,278		3,304	
Effect of Rollover	- 386		- 194	
TOTAL	27,892		3,110	

(2)

No. 91-1835

FILED
JUN 9 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

DOUGLAS M. BIHLER, THOMAS D. KUEHL, PAULA C. MILLER and LISA P. TALLAR-KUEHL,

Petitioners,

vs.

ALAN D. EISENBERG, Individually and as Trustee and Administrator of the Alan D. Eisenberg, S.C. Pension and Profit Sharing Plan, and as President and Sole Director of Alan D. Eisenberg, S.C.; THE ALAN D. EISENBERG, S.C. PENSION AND PROFIT SHARING PLAN; and ALAN D. EISENBERG, S.C., a Wisconsin Service Corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1000, *et seq.*, ("ERISA") provides that a pension fund participant who has received his or her full benefits under the plan document may receive additional extra-contractual damages for a claim based on allegations of a fiduciary breach in the administration of the plan's benefit eligibility rules.

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No. 91-1835

In The

Supreme Court of the United States

October Term, 1991

DOUGLAS M. BIHLER, THOMAS D. KUEHL, PAULA C. MILLER and LISA P. TALLAR-KUEHL,

Petitioners,

vs.

ALAN D. EISENBERG, Individually and as Trustee and Administrator of the Alan D. Eisenberg, S.C. Pension and Profit Sharing Plan, and as President and Sole Director of Alan D. Eisenberg, S.C.; THE ALAN D. EISENBERG, S.C. PENSION AND PROFIT SHARING PLAN; and ALAN D. EISENBERG, S.C., a Wisconsin Service Corporation,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 956 F.2d 651, and is reprinted in the appendix to the petition for a writ of certiorari.

The order and decision of the United States District Court for the Eastern District of Wisconsin (Stadtmueller, J.) have not been reported. They are reprinted in the appendix to the petition for a writ of certiorari. Other memorandum decisions of the District Court appear as Exhibits 8 through 13 of the appendix to the initial brief of the defendants-appellants/cross-appellees in the Court of Appeals.

STATEMENT OF JURISDICTION

Petitioners brought this action in the Eastern District of Wisconsin, invoking federal question jurisdiction under 28 U.S.C. § 1331. On August 30, 1990, the District Court entered judgment for the petitioners.

On appeal, the United States Court of Appeals for the Seventh Circuit entered a judgment on February 10, 1992 and amended it on February 19, 1992. This judgment reversed and denied petitioners' request for extra-contractual damages, but remanded the case to the District Court on other issues.

Petitioners have invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondent, Alan Eisenberg and petitioner Thomas Kuehl

lawyered together for 12 years (Tr. v. 3, p. 386).[1] For much of that time, Kuehl handled the day-to-day administration of the plan (Tr. v. 3, pp. 407-08; 412-15; v. 5, pp. 685-695).

Kuehl knew that Eisenberg was not well-acquainted with the mechanics of plan administration, because he had to help resolve some issues regarding a different attorney's termination and distribution a few years earlier (App. Ex. 21; App. Ex. 25; Tr. v. 5, p. 692); nevertheless, Kuehl never suggested to Eisenberg that he should expedite distributions to any of the petitioners while he — Kuehl — was still a corporate officer and employee (Tr. v. 4, pp. 556-57).

Moreover, the plan document indicated that distributions for employees who terminated prior to retirement could be made no earlier than the end of the plan year in which they were terminated (App. Ex. 14 ¶¶ 5(a), 7(b), 7(c); App. Ex. 15, ¶ 2.21, 2.24, 7.9; App. Ex. 27). There was a question as to whether the original plan or the amended and restated plan was in effect, because the Internal Revenue Service had not provided the typical determination letter approving it to the outside law firm which handled all of the Eisenberg's firm's pension and benefit work (Tr. v. 3, pp. 344-48). In fact, final approval from the Internal Revenue Service was not received until October 1988, well after the instant lawsuit had been filed in November 1987 (App. Ex. 18).

Kuehl left the Eisenberg firm in August 1986 (App. Ex. 27). Whichever plan was then in effect, he could not receive a distribution earlier than the following July, upon the termination of the plan year in which he had left employment. His departure

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1. Citations to the transcript include volume and page number, and are indicated as "Tr., v. ____, p. ____." Citations to appendix exhibits from the Court of Appeals Record are indicated as App. Ex. ____.

was not on cordial terms. Thereafter, Kuehl solicited retention by several former Eisenberg employees and began a series of demands for pension benefit distributions on their behalf as well as his own, often including in those communications other issues such as problems with former clients and outstanding loans Kuehl had taken from the firm. (*See* App. Exs. 27; 29; 30; 31; 32; 33).

Delays in the distribution were inevitable because of the IRS problem, an issue which was sufficiently confusing so that even Eisenberg's independent pension attorney could not readily identify which version of the plan was in effect or what petitioners' rights to distribution allowed or required (Tr. v. 5 at 749; v. 3, pp. 344-48). Kuehl's poor plan record-keeping (as day-to-day administrator) further complicated the process, and he did not help matters when he rejected Eisenberg's requests for identification of the legal authority pursuant to which the distributions were being sought (App. Exs. 24; 28). Their mutual antagonism notwithstanding, Eisenberg directed payment to Kuehl and his clients within days after the instant litigation was filed (Tr. v. 3, pp. 348-50).

Most of the dollar distributions were completed in January and February of 1988, and a few extra dollars were added to complete final reconciliation of that process in March of that year (App. Exs. 16, 19, 20). As a result, petitioners and the fifth plaintiff received the following payments on the following dates:

	1/15/88	2/19/88	3/7/88	Total
Bassler-Harsch	$ 500	$ 762.95	$ 30.19	$ 1,293.14
Bihler	2,000	3,078.06	122.69	5,200.75
Kuehl	21,000	13,032.81	1,894.76	35,927.57
Miller	2,000	2,415.80	105.55	4,521.35
Tallar-Kuehl	4,500	3,751.98	229.91	8,481.89

Id. In addition, the plan offset against Kuehl's balance various loans which he had taken against his plan account (App. Ex. 22; Tr. v. 5, p. 804). This constituted full payment of all benefits due to petitioners.

At trial, the petitioners each offered testimony of how delay in receipt of payment of their benefits allegedly caused them damage. Paula Miller testified that if she had received the funds from the plan earlier she would have paid off credit cards which were accruing 18% interest on the principal balance due (App. Ex. 3 at 4; Tr. v. 3, pp. 303-305). Lisa Tallar-Kuehl testified that delay in payment caused her distribution to be subject to the less favorable provisions of the new Tax Reform Act of 1986 (App. Ex. 3 at 6; Tr. v. 2 at 80). Douglas M. Bihler claimed that delay in payment of benefits due caused him to postpone hiring a secretary for his new law firm (App. Ex. 3 at 5; Tr. v. 2, pp. 115-17). Like his wife, Thomas Kuehl claimed that late distribution caused him to be subject to the new, less favorable tax laws (App. Ex. 3; Tr. v. 4, pp. 510-511). Kathaleen A. Bassler-Harsch offered no evidence of any actual loss resulting from the delay in her distribution (App. Ex. 3 at 11).

The jury awarded $25,000 to Kuehl and $7,500 to each of the other four petitioners upon petitioners' compensatory damage claims (App. Ex. 5). Thereafter, the District Court granted substantial remittitur as to the awards of all of the petitioners but Kuehl, ruling that the awards bore no rational relationship to the evidence (App. Ex. 3). For example, Bassler-Harsch received only $1. Petitioners have never explained why Kuehl should receive this tax advantage when the plan gave him no right to receive payment until after the March 1987 effective date of the Tax Reform Act of 1986. (*See* App. Ex. 14, ¶¶ 5(a), 7(b), 7(c); App. Ex. 15, ¶¶ 2.21, 2.24, 7.9).

On May 11, 1988, in an order denying petitioners' motion to disqualify Judge Stadtmueller, the District Court discussed the realities of this case (App. Ex. 10). Noting the flood of petitioners' motions in the period between the filing of the case and the scheduling conference order, the court stated:

> In my view, these factors unquestionably stem from plaintiffs' counsels' unyielding approach to discovery at the outset. As a consquence, the court found itself cast in the role of referee in what amounted to a children's sandbox spate. (p. 3).

Finding nothing in the record which suggested that it had made any decisions in this case other than upon their merits, the court stated:

> [I]t is difficult to read [plaintiffs' attorney] Mr. Staudenmaier's affidavit as anything more than the product of a badly bruised ego resulting in a fully disguised collateral attack on the wisdom of this court's prior ruling. It plainly is inadequate to support a § 455(a) motion. (p. 5).

The same May 11, 1988 order also denied petitioners' request under Rule 11 that defendant's motion to disqualify their attorney compelled the award of sanctions. *Id.* A week later, by a handwritten letter dated May 18, 1988, counsel for the petitioners cited the court to a newspaper article which allegedly contained "personal shots" at him from the court and further indicated that lawyers who move to disqualify federal judges should not have to risk "being subjected to public calumny from the judge." (App. Ex. 34).

One year later pettitioners sought an injunction prohibiting the plan from distributing assets to the defendant Eisenberg. The

court found that any harm petitioners might suffer was "speculative at best," that petitioners had failed to establish inadequate legal remedies or a danger of irreparable harm, and that the balance of harms clearly favored defendants (App. Ex. 13 at p. 4).

The case now comes down to whether the vexatious and harassing pursuit of extra-contractual remedies, seeking to inflate pension fund distributions which were fully paid years earlier, warrants attorney's fees and other payments. This "sandbox spate" should never have been allowed to get so far out of hand.

REASONS FOR DENYING THE WRIT

PETITIONERS' CLAIMS FOR EXTRA-CONTRACTUAL COMPENSATORY DAMAGES MAY NOT BE MAINTAINED UNDER ERISA.

Within days after petitioners filed this action, respondents informed them they would be paid their benefits in full, and these payments were entirely completed within a few months. Nonetheless, petitioners continued to pursue this lawsuit, pressing a claim for compensatory damages allegedly resulting from the delay in payment of their distributions.[2] The gravamen of the petition is this claim for compensatory damages for the benefit claims.

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2. Petitioners also sought punitive damages, and a discretionary award of attorney's fees and statutory penalties. Petitioners' claim for punitive damages was properly stricken by the District Court. (App. Ex. 11, at 1-2). Citing *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) and *Kleinhans v. Lisle Sav. Profit Sharing Trust*, 810 F.2d 618 (7th Cir. 1987), the District Court correctly ruled that punitive damages were not an available remedy under ERISA. App. Ex. 11, pp. 1-2; 956 F.2d at 660-661.

The Court of Appeals' determination that such relief is not available under ERISA is not only consistent with this Court's decisions and its own precedent, but also with all but one of the other Courts of Appeals that have ruled on this point. Although ERISA's express provisions do not afford such a remedy, petitioners contend that a cause of action should be implied under either ERISA § 502(a)(3) or § 502(a)(1)(B), permitting beneficiaries to recover extra-contractual damages allegedly resulting from the delay in payment of their benefits.[3]

I. Petitioners' Extra-Contractual Damage Claims Cannot Be Sustained Under ERISA § 502(a)(1)(B).

Petitioners' contention that their extra-contractual damage claims may arise under § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), is contradicted by the clear language of that section:

> CIVIL ENFORCEMENT.
>
> (a) PERSONS EMPOWERED TO BRING A CIVIL ACTION. A civil action may be brought—
>
> (1) By a participant or beneficiary—
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

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3. Petitioners' claims may only be sustained under ERISA, as ERISA preempts all state laws insofar as they relate to an ERISA employee benefit plan, 29 U.S.C. § 1144(a); *Pilot Life Ins. Co. v. Dedeaux;* 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

The scope of § 502(a)(1)(B) is strictly limited (by the thrice-repeated phrase "under the terms of the plan,") to contract claims based upon or arising under the provisions of the plan. Claims for extra-contractual damages, such as the claims made by the petitioners herein, by their very nature fall outside the scope of § 502(a)(1)(B), because they do not arise under or depend upon the "terms of the plan." Rather, petitioners merely sought recovery in tort for alleged harm they claim resulted as a consequence of the delay in payment of their benefits.

Petitioners' claims under § 502(a)(1)(B) for benefits due under the plan were mooted at the inception of this lawsuit, when they received full payment of their benefits. Their accounts having been closed and their participation in the plan having terminated, petitioners were certainly neither seeking to "clarify [their] rights to future benefits under the terms of the plan" nor were they seeking to "enforce [their] rights under the terms of the plan." ERISA, § 502(a)(1)(B).

Indeed, any claim for extra-contractual damages, of necessity, must fall outside the scope of § 502(a)(1)(B). In *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985), the plaintiff had been paid all the benefits to which she was entitled under the plan, but continued to press for compensatory damages for harm she allegedly sustained due to the temporary interruption in payment of benefits. This case reversed an appellate court holding allowing such damages, stating:

> Significantly, the statutory provision explictly authorizing a beneficiary to bring an action to enforce his rights under the plan — § 502(a)(1)(B), quoted supra, — says nothing about the recovery of extra-contractual damages, or about the possible consequences of delay in the plan administrators' processing of a disputed claim. Thus, there really

> is nothing at all in the statutory text to support the conclusion that such a delay gives rise to a private right of action for compensatory or punitive relief.

Id. at 144.

> We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA. As we stated in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979): [W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.

Id. at 147. Citing the above-quoted passages from *Russell*, the Fourth Circuit has held that extra-contractual damages are not an available remedy under § 502(a)(1)(B) as a matter of law. *Reinking v. Philadelphia American Life Ins. Co.*, 910 F.2d 1210, 1219-20 (4th Cir. 1990). This was the same analysis adopted by the Seventh Circuit in the instant case, 956 F.2d 655.

Because petitioners' extra-contractual damage claims fall outside the scope of the provisions of ERISA § 502(a)(1)(B), absent some other statutory basis under ERISA, the court below had no choice but to vacate the jury verdict and dismiss petitioners' damage claims.

II. Petitioners' Extra-Contractual Damage Claim Cannot Be Sustained Under ERISA § 502(a)(3) Because It Is Neither a Claim for Equitable Relief, nor a Permissible Remedy Within the Structure of the Statute.

Petitioners also contend that their claims for extra-contractual damages are sustainable under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) which provides:

CIVIL ENFORCEMENT.

(a) PERSONS EMPOWERED TO BRING A CIVIL ACTION. A civil action may be brought —

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

Petitioners contend that the extra-contractual damages they seek constitute "other appropriate equitable relief," within the meaning of this section.

The plaintiff in *Russell*, *supra*, having received full retroactive payment of all benefits to which she was entitled, nevertheless, brought suit under ERISA §§ 502(a)(2) and 409(a), 29 U.S.C. §§ 1132(a)(2) and 1109(a), for a breach of fiduciary duty, seeking extra-contractual and punitive damages allegedly resulting from a wrongful temporary interruption of disability benefits. Based on "the relevant text of ERISA, the structure of the entire statute, and its legislative hsitory," this Court held that no cause of action existed or could be implied under ERISA §§ 502(a)(2) and 409(a) for the recovery of extra-contractual or punitive damages caused by improper or untimely processing of benefit claims. *Russell*, at 148.

While *Russell* did not require a ruling whether a claim for extra-contractual damages might be sustained under ERISA § 502(a)(3), much of the reasoning in its holding that such a claim cannot arise under §§ 502(a)(2) and 409(a) applies equally to the statute as a whole and in particular to ERISA § 502(a)(3). In light of ERISA's carefully crafted remedial scheme, the complete

absence in § 502(a) of any mention of extra-contractual damages demonstrates Congress' deliberate intent not to afford such a remedy, *Russell,* at 144-148.

Because any damages or personal liability for breach of fiduciary duties may only inure to the benefit of the plan, ERISA § 409, the beneficiaries themselves are not permitted to recover any damages suing in their individual capacities. Thus, it is apparent that Congress is primarily concerned with protecting the integrity of the plan rather than sacrificing the group's security to the claims of the individual beneficiary. *Id.* at 144. That ERISA § 409 only provides plan-related remedies for breach of fiduciary duty offers a further indication of Congress' intent not to afford a private cause of action for extra-contractual damages to beneficiaries suing in their individual capacities. *See Sokol v. Bernstein*, 803 F.2d 532, 537 (9th Cir. 1986).[4]

Petitioners attempt to characterize their claim as one for "other appropriate equitable relief" under ERISA § 502(a)(3). However, compensatory damages are a classic form of legal relief, rather than a form of "appropriate equitable relief." In *Sokol v. Bernstein, supra,* the Ninth Circuit held that no cause of action for extra-contractual damages exists under § 502 as "other appropriate equitable relief."

> *Despite Justice Brennan's reservations, See Russell,* 105 S. Ct. at 3097 n. 10 (Brennan, J., concurring in the judgment), *it appears that Congress used the word "equitable" to mean what it usually means — injunctive or declaratory relief.* The above-quoted definition of "appropriate equitable

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4. A decision neither cited nor discussed in *Carich v. James River Corp.*, 958 F.2d 860 (9th Cir. 1992), upon which petitioners place great emphasis.

> relief" [from the Senate Finance Committee's report on ERISA] lists three distinct remedies (injunction, constructive trust, and removal), all of which are closely tied to the plan. *For us to add an extra-contractual remedy to a list of remedies so strongly contractual in nature would be to step beyond the province of the judiciary and into that of the legislature.*

Sokol, 803 F.2d at 537-38 (emphasis added). The Seventh Circuit here adopted the same reasoning, as well as that of its own decision holding punitive damages impermissible in such cases, *Kleinhans v. Lisle Sav. Profit Sharing Trust*, 810 F.2d 618 (7th Cir. 1987), to limit any remedy to that specifically authorized by the statute in the plan, 956 F.2d at 657.

Likewise, the First Circuit has ruled that "other appropriate equitable relief" does not encompass a beneficiary's claim for extra-contractual damages, holding that "other appropriate equitable relief [under § 502] should be interpreted to mean what it says — declaratory or injunctive relief, not compensatory and punitive damages." *Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 824-825 (1st Cir. 1988), *cert. denied*, 488 U.S. 909. Furthermore, in *Powell v. Chesapeake & Potomac Tel. Co.*, 780 F.2d 419, 424 (4th Cir. 1985), *cert. denied,* 476 U.S. 1170, the Fourth Circuit rejected that plaintiff's argument that beneficiaries may seek extra-contractual and punitive damages form a fiduciary as "other appropriate equitable relief" under traditional principles of trust law (which Congress intended to engraft upon ERISA), because "such relief is generally not available in an action by a beneficiary against a trustee for breach of trust" under the common law of trusts. More recently, the Eighth and Eleventh Circuits have taken the same position in *Novak v. Anderson Corp.*, 60 U.S.L.W. 2643, 15 E.B.C. 127 (8th Cir. 1992) and *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819 (11th Cir. 1991). *See*

also: United Steel Workers of America v. Connors Steel Co., 847 F.2d 707 (11th Cir. 1988); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986); *Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987) (both holding punitive damages not available as "other appropriate equitable relief" under § 502).

These decisions are fully consistent with this Court's rejection of judicial expansion of ERISA's remedies or causes of action beyond those already granted by statute. Prior to *Russell*, that unwillingness to tamper with ERISA's carefully crafted remedial scheme was apparent in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), (State lacked standing under ERISA § 502(a)(3) to enforce state tax liens on plan assets because § 502 does not permit suit by any party other than those expressly named.) Subsequent to *Russell, Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987) stated that ERISA preempted the plaintiff's state law tort and contract damage claims arising from the alleged improper processing of his benefit claim, again echoing *Russell's* "reluctance to tamper with" ERISA's enforcement scheme for fear of undermining the delicate Congressional balancing of interests which it embodies, *Pilot Life*, 481 U.S. at 53-54. *See also, Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

The cases cited by petitioners as a conflict in the circuits deal with different problems in different ways. In *Warren v. Society National Bank*, 905 F.2d 975 (6th Cir. 1990), a money manager, (who was not a plan administrator like respondent here, but an outside expert hired as an asset custodian) failed to follow an instruction about the movement of funds, which the Sixth Circuit acknowledged was different from *Russell*, in part, because of "the nature of the alleged injuries and the relief sought", *Id.* 980. Moreover, every circuit which has reviewed that decision has, as did the Seventh Circuit here, declined to follow it because of its

reliance on a concurring opinion, rather than that of the majority, and because the reasoning of the *Russell* majority is more persuasive, 956 F.2d 658-659. The Ninth Circuit decision in *Carich, supra*, did not cite the *Warren* case.

Nor does *Carich* provide a remedy like that sought by petitioners here. Contrary to the suggestions on the petitioners, the court there only remanded the case for further proceedings as to the correct amount of a benefit based on its effective date, not whether extra-contractual damages are permissible, 958 F.2d at 862.

Neither does the Seventh Circuit's decision here conflict with that in *Ingersoll-Rand Company v. McClendon*, 498 U.S. ____, 111 S. Ct. 478, 112 L. Ed. 2d 474 (1990). There the issue was whether a state cause of action was preempted by the exclusive remedies of § 502(a), and this court held that such was the rule. The petitioners cite the following phrase in support of their position. "[T]here is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek 'pension benefits'. It is clear that the relief requested here [which included the employee's reinstatement] is well within the power of federal courts to provide." *Ingersoll-Rand*, 112 L. Ed. 2d at 488.

Instead of applying these statements in the context of a preemption argument, the petitioners claim these two sentences conflict directly with the Seventh Circuit's holding (Pet. at 8). However, the Seventh Circuit, and every Federal Court of Appeals to consider this issue,[5] disagrees with the petitioners. The Seventh

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5. No Court of Appeals has held that the final paragraph of *Ingersoll-Rand* overrules *Russell*. The only other Court of Appeals which considered the issue held that the last paragrah of *Ingersoll-Rand* does not mean that future lost wages, mental anguish and punitive damages are available under ERISA. The Eleventh Circuit interpreted the last paragraph of *Ingersoll-Rand* (Cont'd)

Circuit summarized *Ingersoll-Rand* by saying "we are not rash enough to believe that the Court intended to overrule settled law in most of the circuits as well as narrowly limit, if not overrule its own decision in *Russell* in such an offhand manner" 956 F.2d at 660.

If this Court intended to extend the relief available under ERISA, it certainly would have done so explicitly. Such a departure from precedent would not have been relegated to a single sentence, in dicta at the end of an opinion focused exlusively on a different issue *Id.* at 660, quoting *Monfiletto v. John Hancock Health-Plans*, 1991 U.S. Dist. Lexis 15875, 5 (E.D. Pa. Oct. 30, 1991). The Seventh Circuit's decision does not conflict with any opinion of this Court, nor with that of any other circuit considering the same issue.

(Cont'd)
in the context the statement was made. "The Supreme Court was stating that federal law provides relief for ERISA actions other than those that seek to recover pension benefits, such as the plaintiff's action for wrongful termination." *McRae v. Seafarers' Welfare Plan, supra* at 821, n. 7.

CONCLUSION

One plaintiff has already declined to seek the writ. The others hang on to a single issue: whether they are entitled to more than their full benefits under the plan, in spite of a well-established statutory and case law authority which deny such additional payments. This Court's decision in *Russell* and the holdings of the Courts of Appeals relying upon that analysis would all prohibit this contortion of the statutory structure. A "sandbox spate" between members of a disintegrating law firm does not warrant the further consideration of this Court.

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Respectfully submitted,

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